THE 1329

MECHANICS' LIEN ACTS;

BEING

THE REVISED STATUTE OF ONTARIO

CHAPTER 120,

AND

41 VICTORIÆ, CHAPTER 17,

WITH ANNOTATIONS

BY

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(OF OSGOODE HALL, BARRISTER-AT-LAW, AND REGISTRAR OF THE COURT OF CHANCERY OF ONTARIO.)

"Woe unto him that buildeth his house by unrighteousness, and his chambers by wrong; that useth his neighbour's service without wages, and giveth him not for his work."

"twice over." ?

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PREFACE.

PRIOR to the passing of "*The Mechanics' Lien Act*" of 1873, mechanics and others, doing work, or furnishing materials, for the erection, alteration, or repair of buildings upon the lands of another, were not by the law of the Province of Ontario entitled to any lien or claim upon such lands, for the price of the work and materials, so done, or furnished.

Under the law as it formerly stood, the only remedy for work done upon, or materials put into, buildings, was such as might be afforded by the personal liability of the person, for whom and at whose request, and upon whose credit, the work was done, or materials furnished. The materials by being incorporated into the structure upon the land in most cases became, in contemplation of law, part of the soil, and as such were liable to be sold under executions against the lands of the owner, or would pass to a transferee of the land. This state of the law operated harshly on mechanics and others who had done work and furnished material, and they were often doomed to see the fruit of their labour and money pass into the hands of others, without having received, or being able to collect from their debtor, any compensation whatever therefor.

The object of "*The Mechanics' Lien Act*" is to remedy this apparent injustice, and to afford to those doing work, or supplying materials, for the erection, repair, or alteration of buildings upon the land of others, the additional security of a lien upon the land (including all erections thereon) for the price of such work and materials; and by this means to prevent as far as possible their labour and materials from being appropriated by others, without their receiving compensation.

Legislation of this kind has been frequent in the United States and in many States of the Union, laws of this kind are to be found in force.

The first *Mechanics' Lien Act* which came into force in this Province was passed in the year 1873. It restricted the right of lien on the land, to those who had contracted directly with the owner of the land; but it gave to sub-contractors the right of serving notice of their claims upon the owner, and upon such notice being served, authorized the owner to pay the claims out of any money due by him to the contractors primarily liable therefor.

In 1874 a further Act was passed which extended the right of lien on the land to sub-contractors. The Act of 1873 was not in express terms wholly repealed, but only so much of it as conflicted with the later Act, but many of the sections of the Act of 1873 were re-enacted verbatim in the Act of 1874.

Out of these two Acts the Revised Statute was consolidated, and it has been said of the consolidation that it has in some

respects partaken more of the character of legislation than the consolidation of existing Acts. (See *Walker* v. *Walton*, 1 App. R. p. 592., *per Proudfoot*, V. C.) Any doubts, however, as to the legal effect of the revision are now set at rest by 41 *Vic. c.* 6, (*O.*)

The Act as it now stands appears open to three objections. *First*,—That it casts upon the owner, who may be in no default whatever, the burthen of getting removed from the registry at his own expense, the various liens which may be recorded against his land.

In the case of *Walker* v. *Walton*, *supra*, Mr. Justice Burton stated that a case had come under his notice, where a proprietor had put up a building, and had paid his contractor as his payments fell due, and on endeavouring to deal with his property, found no less than thirty-two claims registered against it, by parties who had been employed by the contractor, and although it was true none of these claims could be enforced, yet it prevented the owner dealing with his property, until he had gone to the expense of getting all the registrations removed.

Where liens are registered against the lands of an "owner" who has made no default, he ought in bare justice to be allowed to retain out of the money payable under his contract, the expense of removing such liens from the registry.

Secondly,—The statute provides in effect that the institution of a suit by a lien-holder shall keep alive all other liens of the same

class. Some of these liens may not have been registered, and after the institution of the suit, there is nothing in the Act to require their registration.

The fact that claims may thus be kept alive without registration seems likely to lead to difficulty, both in ascertaining who are the parties properly entitled to the benefit of the suit, and also in making title to lands sold under decrees made in such suits. If the benefit of the suit were restricted to lien-holders of the same class, whose claims are registered before, or within a limited time, say thirty days, after the institution of the suit, these difficulties would be obviated.

Thirdly,—The form of statement of claim for registration as set forth by the Act, does not require the claimant to show when the debt in respect of which the lien is claimed, is due and payable. This is necessary in order that persons searching the registry may be enabled to see when the period for bringing a suit to enforce the lien will expire. Wherever credit has been given this should appear. The result of this defect in the form of claim is, that the Registry Office really affords no evidence as to the time when registered liens will cease, unless prosecuted by suit.

The language of the Act is in some places somewhat obscure, arising in part from the blending of the two Acts of 1873 and 1874 into one. Instead of contenting myself with pointing out the difficulties, I have deemed it better to state my opinion as to the probable meaning of the passages where they exist; at the

same time I have done so with some diffidence, and not without feeling that the views which I have expressed may not in all cases commend themselves to the judgment of others.

In preparing this edition of the Act, I have endeavoured to elucidate its meaning and effect, not only for the professional reader, but also for the class for whose benefit the Act was designed, and I am in hopes that it may prove of some practical utility to both classes of readers.

The number of reported decisions upon the Act thus far pronounced in our own Courts, is comparatively few, but considerable light is cast upon it by the decisions of the Courts of the United States on kindred statutes, and I have particularly to acknowledge my obligations to Mr. Phillips for the assistance which I have derived from his book on Mechanics' Liens, in the preparation of this little work.

In addition to the Act giving mechanics a lien on land, the Act empowering artisans and others to sell chattels on which they have acquired a lien, is also included.

G. S. H.

Osgoode Hall, August 24, 1878.

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THE MECHANICS' LIEN ACT,

BEING THE

REVISED STATUTE OF ONTARIO,

CHAPTER 120.

An Act to establish Liens in favour of Mechanics, Machinists, and others. (*a*)

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(*a*) This Act came into force on 31st December, 1877. (*See* R. S. O., p. lvii.)

HER MAJESTY, by and with the advice and consent of the Legislative Assembly of the Province of Ontario, enacts as follows:—

Sections 1, 2.

Short Title.

1. This Act may be cited as "*The Mechanics' Lien Act.*"

Interpretation of words

2. In the construction of this Act—

"Contractor."

(1) "Contractor" (*a*) shall mean a person contracting with or employed directly by the owner for the doing of work, or placing or furnishing of machinery, or materials for any of the purposes mentioned in this Act:

"Sub-contractor."

(2) "Sub-contractor" (*b*) shall mean a person not contracting with or employed directly by the owner for the purposes aforesaid, but contracting with or employed by the "Contractor," or under him by another "Sub-contractor"; and

"Owner."

(3) "Owner" (*c*) shall extend to and include a person having any estate or interest, legal or equitable, in the lands upon, or in respect of which the work is done, or materials or machinery are placed or furnished, at whose request and upon whose credit, or on whose

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behalf, or with whose privity or consent, or for whose direct benefit any such work is done, or materials or machinery placed or furnished, and all persons claiming under him, (*d*) whose rights are acquired after the work in respect of which the lien is claimed is commenced, or the materials or machinery furnished have been commenced to be furnished. (38 Vic. c. 20, s. 1.)

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Contractor.

(*a*) "*Contractor.*" Every person contracting directly with the "owner" is a "contractor" under the Act. Where therefore the "owner" contracts with several different persons to construct different parts of the building, each person so contracted with is a "contractor," and each "contractor" would appear to be a lien-holder of the same class. (*See Bunting* v. *Bell*, 23 Gr. 584.)

Sub-contractor entitled to lien on the land.

(*b*) "*Sub-contractor.*" Under the Act of 1873 "sub-contractors" were not entitled to register liens, but were only entitled to give notice to the "owner" of their claims against the "contractor." (*See section* 8.) The Act of 1874, however, extended the right to register liens, to "sub-contractors." (*McCormick* v. *Bullivant*, 25 Gr. 273.) By the definition here given of the word "sub-contractor" it would seem to include all sub-contractors, in however remote a degree they may stand from the original contractor. For example, if A contract with the "owner" to build a house, and then B contracts with A to do the painting and papering, B is a "sub-contractor," and as this section in effect declares that any person employed by a "sub-contractor" is himself a "sub-contractor," it follows that if C contract with B to do part of the painting, and D contract with B to do the papering, and E. contract with C to furnish the paint required for the work, and F contract with D to furnish the paper therefor, B, C, D. E, and F are all "sub-contractors" under the Act, and as such entitled to liens.

(*c*) "*Owner.*" It is important to bear in mind that the lien given by this Act to "contractors" and "sub-contractors" is to attach upon the estate and interest, legal and equitable, of the "owner" in the building, erection or mine upon or in respect of which the work is done, or

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Owner includes persons having any estate or interest in land, for whom work done, &c.

the materials or machinery placed or furnished. (*See section* 6.) This section provides that the word "owner" is to extend to and include persons having "any estate or interest, legal or equitable, in the lands upon, or in respect of which the work is done, or materials or machinery are placed or furnished, *at whose request and upon whose credit, or on whose behalf, or with whose privity or consent, or for whose direct benefit any such work is done,*" *&c.* The word "owner" therefore includes all persons however small their interests in the land may be, at whose request and upon whose credit, or on whose behalf, or with whose privity or consent, or for whose direct benefit any work is done, &c.

Owner must be bound by contract express or implied.

In order that a lien may attach under the Act, it is necessary that the original contract, by virtue of which it is claimed to arise, be one that is binding on the "owner." It is not necessary that the contract of the lien-holder himself, should be made directly with the "owner," otherwise all sub-contractors would be excluded from the benefit of a lien, but it is necessary that the owner should be legally liable to the contractor under whom a sub-contractor claims directly or indirectly.

Where the contract, therefore, by virtue of which the lien is claimed, is made with an "owner" who is a minor or lunatic, no lien could be enforced under the Act by the contractor or any sub-contractor, because minors and lunatics are incapable of binding either themselves or their lands by contracts for the erection of buildings or improvements, on their property. And it would seem that a contract made with a guardian of a minor, without the sanction of some competent Court, for the erection of a building on the minor's land, would not give any right to a lien under the Act. (*Copley* v. *O'Neill*, 57 Barb. 299, *and see Collins* v. *Martin*, 41 Q. B. 602.)

Where the "owner" of land is a married woman, she must be bound by any contract, express or implied, under which any buildings or improvements may be erected or made upon her land, otherwise no lien will attach upon her land for the price. It is not sufficient that the work has been done, or materials have been furnished, at her husband's request, unless it can be established that the husband acted as his wife's agent: the relationship of husband and wife does not of

itself raise any presumption that the husband acted as his wife's agent. Where a husband on his own responsibility, procured a building to be erected on his wife's land, without her consent or concurrence, it was held that she was not liable for the price (*Wagner* v. *Jefferson*, 37 Q. B. 551; *Esslinger* v. *Huebner*, 22 Wis. 602), and on principle it would seem clear that under such circumstances neither her land, nor the building erected thereon, could be subject to a lien under this Act.

Sections 2, 3.

(*d*) "*And all persons claiming under him.*" The right to a lien cannot be defeated by the death of the "owner," or by his transferring the property to another, but all persons claiming under the "owner" whose rights accrue after the work or materials in respect of which the lien is claimed have been commenced to be done or furnished, will take subject to the lien, provided it be duly enforced as provided by the Act. (*See sections* 20 *&* 21. *See however*, *Douglas* v. *Chamberlain*, 25 Gr. 289-90.)

Owner includes all transferees of original owner who acquire title after work commenced, &c.

But where a mortgage is given to secure advances to be applied in the erection of a building upon land, and all the money is advanced before any of the work is done by persons who subsequently register liens, the interest of the mortgagee is not bound by such liens, (*See Cameron's Opinions*, p. 184,) except as provided by *section* 7.

Mortgagee not bound by lien for work done after money advanced.

So also where a mortgage was given to secure future advances, and advances were made after a right of lien had been acquired under the Act, but before registration thereof and without any actual knowledge of the lien by the mortgagee, it was held that the lien holder was not entitled to priority over the claim of the mortgagee in respect of such subsequent advances. (*Richards* v. *Chamberlain*, 25 Gr. 402.)

Further advances after lien acquired but before registration or actual notice.

3. Unless there is an express agreement (*a*) to the contrary, every mechanic, machinist, builder, miner, labourer, contractor or other person (*b*) doing work (*c*) upon or furnishing materials to be used (*d*) in the construction, alteration or repair of any building or erection, or erecting, furnishing, or placing machinery of any kind (*e*)

Mechanics and others to have liens for constructing.

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in, upon, or in connection with any building, erection, or mine, shall by virtue of being so employed (*f*) or furnishing, have a lien or charge for the price of such work, machinery or materials upon such building, erection or mines, and the lands occupied thereby, or enjoyed therewith, and limited in amount (*g*) to such sum as is justly due to the person entitled to such lien. (36 Vic. c. 27, s. 1; 38 Vic. c. 20, s. 2.)

Agreement not to register liens with whom to be made.

(*a*) "*An express agreement.*" It is not stated with whom such express agreement is to be made. To disentitle a "contractor" to a lien it is clear the agreement must be made between the "contractor" and the "owner." But whether such an agreement between a "contractor" and the "owner" would bind a "sub-contractor," is not so clear. On the one hand it may be said that only the persons who are actually parties to the agreement can be bound by it (*see Guernsey Mechanics' Lien Law*, ss. 626-7,) and on the other hand it may be said that a sub-contractor must be assumed to contract subject to all the equities existing between the "owner" and the "contractor," and if the latter have debarred himself and his sub-contractors by express agreement from any lien on the property, any "sub-contractor" claiming under him or any of his "sub-contractors" is bound by the agreement. The latter view seems the more correct one. (*See Phillips on Mechanics' Liens*, s. 272.)

Persons contracting as sub-contractors in the expectation of acquiring a lien under the Act, at all events would do well, before engaging in the work, or furnishing materials, to enquire of the "owner" whether there be any agreement between him and the "contractor" debarring the latter or his "sub-contractors" from claiming a lien. For even assuming that the right of "sub-contractors" to register liens can only be barred by an express agreement between themselves and the "owner"; their liens might nevertheless be rendered fruitless by the "owner" stipulating with the "contractor" not only that the latter and his "sub-contractors" should not be entitled to any

lien, but also that in the event of any lien being claimed or registered, the money to be payable under the contract should be forfeited, because the lien of the "sub-contractor" being limited to what is due by the "owner" to the "contractor," if nothing be due, the "sub-contractor" can get no benefit from his lien.

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(*b*) "*Or other person.*" An architect is entitled to a lien under this section, for drawing plans and specifications, and superintending the erection of a building. (*Arnoldi* v. *Gouin*, 22 Gr. 314.)

Architect entitled to lien for plans &c.

A "contractor" is entitled to a lien upon the estate, not only for his own personal labour, but also for the labour of all employed by him, and also for all materials he has furnished or procured to be furnished for which he is liable. The fact that a lien is also given to the journeyman or other labourers employed by the "contractor" is not inconsistent with the latter's right of lien: the effect of the "sub-contractors" enforcing their liens against the land is merely to diminish *pro tanto* the lien of the "contractor." (*See Phillips on Mechanics' Liens, s.* 40.)

Lien holder is entitled to lien not only for his own work but for that of others employed by him.

(*c*) "*Doing work.*" In order to entitle the mechanic or material-man to enforce a lien for his work or materials, the work must be done and the materials must be furnished substantially according to the original contract between the "owner" and the "contractor," whether the work be done and the materials be furnished by the "contractor" himself or any "sub-contractor" under him. If there be any substantial variation from the contract, then there must be actual acceptance of the work and materials by the "owner" sufficient to create a new contract to pay for them, or he must have assented to the variation or must himself have prevented the performance of the contract.

Work must be substantially according to contract made with owner.

Exceptions to rule.

Where buildings are erected on the land of another, or repairs or alterations are made to such buildings, the possession of the land by the owner necessarily involves possession of the buildings in their existing state, and no inference can be drawn merely from such possession, or even from actual user of the buildings so erected, altered, or repaired, of an acceptance of an imperfect performance of the contract for the erection, alteration, or repair thereof, so as to entitle the contractor to recover, either on the special contract or under

Acquiescence in breach of building contract cannot be inferred from possession of land by owner.

Section 3.

the common counts a *quantum meruit.* (*See Munro* v. *Butt*, 8 E. & B. 738; *Ellis* v. *Hamelin*, 3 Taunt. 52, *and Pattinson* v. *Luckley*, L. R. 10 Ex. 330.)

But where the deviation from the contract arises in respect of some matter, the performance of which does not constitute a condition precedent to the right to recover, as, for instance, the completion of the work by a certain day, the value of the work may be recovered and a lien thereon might in such case be enforced. (*Lucas* v. *Godwin*, 3 Bing. N. C. 737.)

Whether it will suffice that a sub-contractor's work is in accordance with the contract made between him and his immediate employer?

Under a statute which provided that "every building shall be subject to a lien for the payment of all debts contracted for work done or materials furnished for or about the erection or construction of the same," it was held that it was sufficient to entitle a sub-contractor furnishing materials and work, to a lien therefor, that his work was in accordance with the contract made by him with the contractor, notwithstanding that as between the owner and the contractor there was no performance of the contract. (*See Rand* v. *Leeds*, 2 Phila. 160.) It seems, however, unlikely that such a conclusion could be arrived at under our Act in the face of *section* 6, which provides that the "lien shall not in *any case* attach upon such estate and interest (*i. e.*, of the 'owner.'), so as to make the same or the owner thereof liable to the payment of any greater sum, than the sum payable by the owner to the "contractor." Under this provision, any defence which the "owner" could set up against a claim by the "contractor," for the price would seem equally available against any "sub-contractor" under him.

Not necessary that all labor should be performed on land.

It is immaterial whether all the labour is actually performed on the land, or in the work shop, or elsewhere, if it finally go into the work contracted for. (*See Phillips on Mechanics' Liens*, s. 40.) But the work or services must be immediately connected with the erection. (*Ib. s.* 155.)

Lien of material-man for materials.

(*d*) "*To be used.*" The question has frequently arisen in the United States whether it is essential to entitle a material-man to a lien, that the material in respect of which the lien is claimed, should have been actually incorporated in the building erected on the land upon which the lien is claimed. (*See Phillips on Mechanics' Liens*, ss. 148-151.)

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It has been held under this Act that as between lien-holders *inter se* and for materials furnished to a contractor (and *a fortiori* to a sub-contractor) there is no lien under the Act until the materials have been affixed to the building or erection. But as between material men and the "owner" of a building, the former have a lien for materials sold to the latter, to be used on the building, though not used, and others procured elsewhere. All the claimant in the latter case is required to show, is the fact that the materials were furnished for the purpose of being used in constructing or repairing the building. (*See Bunting* v. *Bell*, 23 Gr. 588.) Questions may arise between different material men, where both had sold on the credit of the building, the materials of one having been used in its erection and the others not; but such questions would have to be adjusted by a Court of Equity. (*See Esslinger* v. *Huebner*, 22 Wis. 602.)

As between lien holders *inter se*, material must have been actually used on building to entitle material-man to lien. As between material-man and owner *secus*.

(*e*) "*Placing machinery of any kind.*" The word "machinery," as here used, would only cover machines of a fixed or stationary character, and would not be construed to include locomotives and portable machines. (*See Phillips on Mechanics' Liens*, s, 178.)

Machinery must be of fixed or stationary character.

(*f*) "*Shall by virtue of being so employed.*" The employment here spoken of must be by some person having either an interest in the land, or an interest direct, or indirect, in a contract made with a person having an interest in the land. The employment by a person having neither an interest in the land nor an interest in a contract made with an "owner" of the land, would give no right to a lien under the Act. (*See section* 2, *p.* 6, *note c.*)

Employment of lien-holder necessary to create lien.

(*g*) "*Limited in amount.*" The lien is "limited in amount to such sum as is justly due to the person entitled to such lien," that is to say, the lien-holder cannot recover more than that sum, but this must be read in connection with *section* 6, and from that section it will appear that although the lien-holder cannot recover more, he may not in all cases be entitled to recover against the land, as much as is justly due to him from his debtor. Where the lien-holder is a "sub-contractor," the amount for which he is entitled to enforce his lien against the land, can never exceed the amount due by the "owner" to the "contractor," no matter how much more may be due to the lien-holder, by the "contractor" or "sub-contractor" through whom he claims; and

Amount of lien.

Section 4.

where there are several "sub-contractors" of the same "contractor" or "sub-contractor," each is entitled only to a *pro rata* share of the amount, which the "contractor" or "sub-contractor" through whom the lien is claimed, is entitled to receive from the "owner." (*See section* 17.) For any excess due to the lien-holders over and above what they can recover from the land they are entitled when suit is brought, to execution against their debtors. (*See section* 17.)

Lien-holders entitled to charge on 10 p.c. of price payable by owner to contractor.

In addition to the lien on the land every "sub-contractor" has also now a charge upon ten *per centum* of the price to be paid by the "owner," which is to endure until the expiration of ten days from the completion of the work, or furnishing the material, without either registration or notice to the "owner." (*See* 41 *Vic. c.* 17, *s.* 2, *post* p. 49.)

Statement of claim may be registered

4. A statement of claim in the form or to the effect (*a*) in the schedule to this Act, may be filed (*b*) in the Registry Office in the County or other Registration Division in which such land is situate, before or during the progress of the work (*c*) aforesaid, or within thirty days from the completion thereof, or from the supplying or placing of the machinery aforesaid.

Affidavit of verification of claim.

2. Such statement of claim shall be verified (*d*) by the affidavit of the person entitled thereto, to be sworn before any Commissioner (*e*) for taking affidavits in the County, and shall state:

(*a*) The name and residence of the claimant, and of the owner of the property to be charged, (*f*) and of the person for whom and upon whose credit the work is done, or materials or machinery furnished, and the

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time or period within which the same was, or was to be, done or furnished;

(*b*) The work done, or materials or machinery furnished;

(*c*) The sum claimed as due, or to become due;

(*d*) The description of the land to be charged. (*g*)

3. When such statement is so registered, the person entitled to said lien shall be deemed a purchaser (*h*) *pro tanto*, and within the provisions of "*The Registry Act.*" (36 Vic. c. 27, s. 2.)

Form of claim to be registered.

(*a*) "*In the form or to the effect.*" It is not essential that the exact wording of the form given in the schedule should be followed, but it seems essential that all the facts required by sub-sections *a*, *b*, *c*, and *d*, should be embodied in the notice filed. For form of statement (*see post p.* 47.)

Registration of claim when necessary.

(*b*) "*May be filed.*" Although the registration of the claim is not necessary to create a lien, it is essential to its continuance "after the expiration of thirty days after the work has been completed or materials or machinery furnished," unless in the meantime a suit have been commenced to enforce it, by the lien-holder or some other lien-holder of the *same class*, and a certificate of *lis pendens* registered. (*See sect.* 20.) If the period of credit between the "owner" and the "contractor," or the other lien-holder and his debtor, extend beyond the thirty days, and the claim of the lien-holder be not registered, the omission to register will have the effect of defeating the lien. For where the period of credit has not expired, no suit can be brought to enforce the lien. (*Burritt* v. *Renihan*, 25 Gr. 183.)

Within what time claim

(*c*) "*Before or during the progress of the work,*" *&c.* The claim may be registered for work before its commencement or during its progress, or

Section 4. must be registered.

within thirty days after its completion; but the claim for materials or machinery can only be registered within thirty days from the supplying of the materials or placing the machinery. The word "supplying" would appear to be intended to refer to materials furnished under the preceding section, (*see ss. b and sections* 20 *and* 21,) and not merely to machinery.

Where materials or machinery under a single contract are delivered piece-meal, it would seem that the thirty days in which the suit must be brought or lien registered would not commence to run until there had been a complete delivery of all the material or machinery included in the particular contract.

Affidavit of verification.

(*d*) "*Verified by the affidavit.*" Where the affidavit referred to the claim as "the paper annexed, marked A," and the paper annexed had no such mark on it, but was proved to be the paper prepared for registry, and in that condition annexed to the affidavit, it was held that the omission to mark it A did not invalidate the registration. (*Currier* v. *Friedrick*, 22 Gr. 248.)

FORM OF AFFIDAVIT VERIFYING CLAIM.

Form of Affidavit of verification of claim.

COUNTY OF ——— } I, (*name of deponent in full,*) of (*residence and*
To wit. } *occupation*) make oath and say:

1. I claim a lien upon the estate or interest of [*name of "owner" of land*] of ——, in respect of the work [*or* materials] mentioned in the annexed (*or* above written) statement of claim.

2. I further say that all of the said work [*or* materials] in the said statement of claim specified was done [*or* were furnished] by me for the construction (*or* alteration *or* repair) of a building or erection upon the lands in the said statement of claim mentioned, [*or* I further say that the machinery in the statement of claim mentioned was erected (*or* furnished *or* placed) by me in (*or* upon *or* in connection with) a building (*or* erection *or* mine) upon the lands in the said statement of claim mentioned,] for and upon the credit of (*name of owner, contractor, or sub-contractor, by whom deponent was employed.*)

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3. I further say the said work was done (*or* is to be done) [*or* the said materials *or* machinery, were so furnished (*or* placed *or* erected) by me upon the said premises] as aforesaid, on the —— day of —— *or* on or before the —— day of ——, *or* between the —— day of ——, and the —— day of ——.]

4. The amount due (*or* and to become due) in respect of the said work (*or* materials *or* machinery) is the sum of $—— (*amount mentioned in statement of claim.*)

5. That the land upon which [such work was done (*or* such materials *or* machinery) were so furnished (*or* place *or* erected] is to the best of my knowledge and belief correctly described in the said annexed (*or* above written) statement of claim.

Sworn before me at the —— of —— in the County of —— this —— day of —— A.D. 18—. (*Signature of Commissioner.*) } (*Signature of deponent.*)

A Commissioner for taking affidavits in the County of —— .

Before whom to be sworn.

(*e*) "*Before any Commissioner.*" The Commissioner must be one appointed by one of the Superior Courts to administer oaths in the County where the affidavit is sworn. The jurat of the affidavit should show that the person before whom the oath is taken is such a commissioner, but the words, "A Commissioner, &c.," are sufficient. (*Babcock* v. *Bedford*, 8 C. P. 527; *Pawson* v. *Hall*, 1 U. C. P. R. 294; *Brett* v. *Smith*, *ib.* 309.)

What affidavit to contain

(*f*) "*The name and residence of the owner of the property to be charged.*" The "owner" here spoken of is the person against whose interest in the land the lien is to be enforced, not necessarily the owner of the fee (*see ante sec.* 2, *p.* 5, *note c.*) Where the "owners" were a corporation aggregate, the misnomer of the corporation in the registered claim was held to invalidate the registration as against a subsequent mortgagee. (*Boult* v. *Wellington Hotel Co.*, before Blake, V. C. at Guelph, 1st October, 1878.)

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(*g*) "*The description of the land to be charged.*" Care must be taken correctly to describe the land. Where it forms part of a subdivision according to a registered plan it must be described according to that plan. General descriptions such as "part of lot A," without specifying distinctly the part intended should be avoided.

Effect of registration.

(*h*) "*Shall be deemed a purchaser.*" The claim, whether registered or unregistered, is liable to be defeated by payments not exceeding ninety per cent. of the contract price made in good faith by the owner "to the contractor" or by the "contractor" or "sub-contractor" to the person by whom the lien-holder was employed before they receive *notice in writing of the lien.* (*See sec.* 11.) In addition to registration, in order effectually to protect the claim of the lien-holder notice in writing to the "owner," is in all cases necessary, and where the lien is claimed by a "sub-contractor" notice should be given to the "contractor" and all the "sub-contractors," if any, through whom the lien-holder claims. By registration the lien-holder acquires priority over all prior unregistered deeds of which he has no actual notice. (*See "The Registry Act,"* s. 74.)

Registration of claims.

5. The Registrar, upon payment of the fee of one dollar, shall register such claim, so that the same may appear as an incumbrance against the land therein described; and such lien shall be discharged by the Registrar on his receiving a certificate to that effect from the person entitled to said lien, (*a*) and verified as required in cases of certificate of discharge of mortgage. (36 Vic. c. 27, s. 3.)

Discharge of registration.

Personal representative entitled to benefit of lien of a deceased lien-holder.

(*a*) "*The person entitled to said lien.*" Where the person by whom the claim was originally filed dies, the right of lien passes to his executor or administrator, as the case may be, (*See section* 16) and the certificate of discharge in that case should be signed by such executor or administrator.

FORM OF CERTIFICATE OF DISCHARGE OF LIEN.

Section 5.

Form of certificate of discharge of lien.

To the Registrar of the County of ———

I, ——, of ——, ——, [*if so* executor of the last will and testament of A. B. deceased,] do certify that —— has satisfied all money due or to grow due to me [*if so*, as such executor] in respect of the claim filed by me [*or* the said A. B.] on the —— day of ——, 18—, against the estate or interest of —— in the following lands and premises, that is to say, [*description of lands as set out in the registered claim*] and that my claim has not been assigned, and I am the person entitled by law to receive payment thereof, and that my lien upon such lands and all erections thereon under "*The Mechanics' Lien Act*" is therefore discharged.

Witness my hand this 17 day of —— A. D. 1885

(*One witness.*)

AFFIDAVIT OF EXECUTION.

Affidavit of execution.

COUNTY OF——— } I, ——, of the —— of ——, in the County of
TO WIT: } ——, (*occupation*) make oath and say:

1. That I was personally present and did see the annexed (~~or within~~) certificate [and duplicate, *if any, according to the fact*,] duly signed and executed by the party thereto.

2. That the said certificate [and duplicate, *if any, according to the fact*] were executed at the —— of ——.

3. That I know the said (*name of party signing the certificate.*)

4. That I am a subscribing witness to the said certificate [and duplicate, *if any*.]

Sworn before me at the —— of ——,
in the County of ——, this ——
day of ——, A.D. 18—.
(*Signature.*)
A Commissioner, &c.

(*Signature of deponent.*)

Section 6.

Upon what property the lien shall attach.

6. Every lien (*a*) under this Act shall attach upon the estate and interest, (*b*) legal or equitable, of the owner in the building, erection or mine upon or in respect of which the work is done or the materials, or machinery placed or furnished, and the land occupied thereby or enjoyed therewith; (*c*) but the lien shall not in any case attach upon such estate and interest, so as to make the same or the owner thereof liable to the payment of any greater sum than the sum payable by the owner to the contractor; (*d*) and in case the lien is claimed by a sub-contractor, the amount which may be claimed in respect thereof shall be limited to the amount payable to the contractor or sub-contractor (as the case may be) by whom the work has been done, (*e*) or the materials or machinery have been furnished or placed. (38 V. c. 27, s. 3.)

Proviso, lien not to attach for more than due by owner to contractor.

Where the lien is on the leasehold the fee may be charged in certain cases.

2. In cases where the estate or interest charged by said lien is leasehold, the fee simple may also, with the consent of the owner thereof, be subject to said charge, provided such consent is testified by the signature of such owner upon the statement of claim at the time of the registering thereof, and duly verified. (36 V. c. 27, s. 10.)

Sub-contractors entitled to liens on land of owner.

(*a*) "*Every lien.*" This includes not only the liens of those who contract directly with the "owner," but also the liens of "sub-contractors" between whom and the "owner" there is no privity of contract. The effect of the Act appears to be to make each sub-contractor an assignee *pro tanto* of the original contractor.

Section 6.

Interest upon which lien attaches.

(*b*) "*Upon the estate and interest.*" The lien attaches not absolutely against the land itself, but only against such estate or interest as the "owner" that is, the person for whom, directly or indirectly, the work is done or materials furnished, has in the land; (*see section* 2, *ss.* 3,) and it is only that estate or interest, whatever it may be, that can be sold for the satisfaction of the lien. (*See Phillips on Mechanics' Liens, sec.* 186, *et seq.*)

Extent of land covered by lien.

(*c*) "*And the land occupied thereby and enjoyed therewith.*" This includes that extent of ground and no more which, under all the circumstances, is reasonably proper and necessary for the enjoyment of the particular building. It is said that in cities the building lot attached to the house is unquestionably intended, and that in country villages, although lots are generally larger, yet they are equally necessary for the enjoyment of the various structures erected upon them, and that an acre in such villages is not unreasonable (*see Phillips on Mechanics' Liens*, s. 200), and where two adjacent town lots are used together without an actual division between them as one mill lot, a part of the buildings and machinery being upon one and a part upon the other, the lien extends to both lots (*ib*).

Lien only extends to land on which work done, &c.

"*Upon or in respect of which the work is done.*" The lien will not extend to any land or building except that upon or in respect of which the work is done or materials furnished. Where a mechanic contracts with one person, for the erection of two separate buildings under two distinct contracts, each parcel of land is only liable for the building erected thereon, and the mechanic cannot register a claim against both parcels for one gross sum in respect of the two; if he include both parcels in one claim, he must at least show how much is claimed against each parcel. (*Currier* v. *Friedrick*, 22 Gr. 243.)

Amount for which lien may be enforced not to exceed sum due from owner to his contractor.

(*d*) "*Any greater sum than the sum payable by the owner to the contractor.*" No matter what may be the aggregate amount of the claims of "contractor" and "sub-contractors," they cannot in any event be enforced against the land for any sum beyond what is due from the "owner" to the "contractor," unless the owner have made payments to the contractor in order to defeat or impair the claim of the lien-holder (*see section* 11), or within the prescribed time have made payments exceeding ninety per cent. of the contract price (*see Ib.*), and even then only to the additional extent of such payments.

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(*e*) "*By whom the work has been done.*" The word "by" has here been substituted for the word "for" in the original Act. (*See* 38 Vic. c. 20, s 8.) This substitution is obviously a mistake, and the section would probably be construed by the Courts as if it still stood as originally passed (*See observations of Spragge*, C., *Crone* v. *Struthers*, 22 Gr. 249.) The meaning of the section is, that where the lien is claimed by a "sub-contractor" who has done work or furnished materials under a contract with another "sub-contractor," the lien-holder cannot recover more against the land than is due from the "owner" to the person with whom the lien-holder contracted, and for whom the work was done or materials supplied.

Mortgaged lands.

7. In case the land upon or in respect of which the work is done or materials or machinery are placed, (*a*) is encumbered by a mortgage or other charge existing or created before the commencement of the work (*b*) or the placing of the materials or machinery upon the land, such mortgage or other charge shall not have priority over the lien to any greater extent than the sum by which the selling value of the land, with such work, materials or machinery thereon, exceeds the sum by which such selling value thereof has been actually increased (*c*) by the improvement caused by such work, materials, or machinery being placed thereon. (38 V. c. 20, s. 4.)

Materials furnished for buildings on mortgaged lands must be incorporated to give any

(*a*) "*Materials or machinery are placed.*" Although as we have seen a lien may in some cases exist for materials furnished "to be used" in the construction or repair of building, although such material may not be actually incorporated, (*see section* 3) yet under this section it is clear there must be an actual incorporation of the material in order to give the lien-holder any prior claim as against a mortgagee, because it is of the very essence of the provision in favour of the lien-holder that

the value of the land is increased, by the work done and materials furnished, in respect of which the lien is claimed.

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right as against mortgagee.

(b) "*By a mortgage or other charge existing or created before the commencement of the work,*" &c. As against a registered lien the mortgage or other charge must be registered, or one of which the lien-holder had actual notice before registering his lien, otherwise the registered lien-holder would be entitled to priority for the full amount of his lien. (*See* "*The Registry Act,*" *s.* 74, *and section* 4, *ss.* 3 *ante* p. 13.) Where a mortgage is given to secure future advances, and the mortgagee makes further advances subsequent to the acquisition of a right of lien under this Act, but before such lien has been registered, and before he has actual notice of the lien, the mortgagee is entitled to priority over the lien-holder in respect of such further advances. (~~*Douglas*~~ Buchanan v. *Chamberlain*, 25 Gr. 402.)

Registered lien holder entitled to priority over unregistered mortgage of which he has no notice.

(c) "*Such selling value thereof has been actually increased.*" This section is not very happily worded, the Legislature appears to have intended to provide that a mortgagee should not have priority over a lien-holder to any greater extent than the selling value of the land including the improvements, less any increase caused in such selling value, by the improvements; and that as to such increase the lien-holders by whom such increase in value was caused should be entitled to priority. And this appears to be the construction placed upon this section by the Court of Chancery. (*See Broughton* v. *Smallpiece*, 25 Gr. 290.)

Extent to which lien-holder entitled to priority over a prior mortgagee

Broughton v. *Smallpiece.*

In that case the contract price for the work was $1,950, but it only increased the selling value of the land $400, and it was said, "If all the workmen had liens they would only have priority to the extent of $400, and each would have to abate in the proportion the work of each bore to the whole, and *from the amount so ascertained would have to be deducted sums paid on account of the work.*" And again, "Suppose his work (*i. e.*, the lien-holder's) was one quarter of the whole, say $1,950÷4=$487.50, then he would be entitled to priority on one fourth of the $400, or $100; and he has been paid all but $102 of his claim, thus he has received $385, nearly four times more than the sum by which his work increased the selling value." And again, "When the owner paid the other mechanics, as I assume he

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has done, as no other lien has been set up, he must be taken to have done so for the benefit of the mortgagee." From this case it appears that where the improvements have been made by several parties, each is entitled to priority on the sum by which the selling value of the property has been increased by the improvements, in the proportion which the value of the work done or materials furnished by him bears to the value of the whole improvements; and that where the property is insufficient for the payment of the mortgage debt, the lien-holder is bound to credit as against the sum in respect of which he is entitled to priority, all payments made on account of his claim, and that all payments made by the owner in reduction or satisfaction of the claim of lien-holders, will be deemed to be made in ease of the mortgagee. Under the ordinary rule, as to the application of payments, the creditor in the absence of express appropriation by the debtor to the contrary, would be entitled to apply money received from his debtor in discharge of that claim, for which he holds the least security. (*See Armour* v. *Carruthers*, 4 U. C. L. J. 210; *Fraser* v. *Locie*, 10 Gr. 207.) And it might, with some show of reason, be urged that a lien-holder receiving payments from his debtor, in the absence of any appropriation thereof by the debtor, is entitled to apply them first in discharge of that part of his claim, which is practically unsecured. This point, however, does not seem to have been taken before the learned Vice-Chancellor.

Mortgagee against whom relief claimed is a necessary party.

Where relief is claimed against a mortgagee under this section, the mortgagee is a necessary party to the suit, and the bill must state distinctly that the encumbrance was created on the land before the commencing of the work or placing of the materials thereon, and where the bill stated the date of the mortgage as "on or about," &c., it was held insufficient to found a decree against the mortgagees, notwithstanding that they had suffered the bill to be taken *pro confesso*. (*Douglas* v. *Chamberlain*, 25 Gr. 288.)

Allegations in bill must be positive.

notify owner.

8. All persons furnishing material to, or doing labour (*a*) for, the person claiming a lien under this Act, (*b*) in respect of the subject of such lien, who notify the owner of the premises sought to be affected thereby, within thirty days after such material is furnished or labour

performed, (*c*) of an unpaid account or demand against such lien-holder for such material or labour, shall be entitled to a charge therefor *pro rata* upon any amount payable by such owner under said lien; (*d*) and if the owner thereupon pays (*e*) the amount of such charge to the person furnishing material and doing labour as aforesaid, such payment shall be deemed a satisfaction *pro tanto* of such lien. (36 V. c. 27, s. 11.)

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(*a*) "*All persons furnishing material to, or doing labour.*" This section was originally part of the Act of 1873, which allowed liens to be registered only by persons who contracted directly with the "owner." By the Act of 1874 the right to register liens was extended to all sub-contractors. The latter have, therefore, now the double right to register and enforce their liens by suit, or to give notice under this section.

Sub-contractors have right, to lien on land, and to give notice of claim to "owner."

(*b*) "*The person claiming a lien under this Act.*" These words are somewhat indefinite. The third section gives a lien to the mechanic and others doing work or furnishing material "by virtue of being so employed or furnishing." Under the Act of 1873 no right of lien existed until registration of the claim. (*See* 36 *Vic. c.* 27, *s.* 2.) But under this Act no active assertion of a claim on the part of the lien-holder is now essential to his right of lien. The right of lien is given by the statute, and enures to the benefit of the lien-holder without registration or bringing of suit, for the space of thirty days after the work is completed, or the material furnished. The words "claiming a lien" would therefore probably be construed as equivalent to "having a lien." They would not, therefore, include a person debarred by express agreement from having a lien.

Notice cannot be given where the debtor of the sub-contractor is not entitled to a lien on the land.

(*c*) "*Within thirty days after such material is furnished or labour performed.*" That is by the person giving the notice. Until this period has elapsed, the lien of the "contractor" or "sub-contractor," for whom the work has been done or material furnished, will continue

Time within which notice to be given.

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without registration or suit, not only for the work done and materials furnished by himself, but also for those which he has procured to be done and furnished by others, and for the payment of which he is liable. (*See ante p.* 9, *note b.*)

Sub-contractor giving notice entitled to charge upon money due to his debtor from owner.

(*d*) "*Shall be entitled to a charge pro rata upon any amount payable by the owner under said lien.*" The charge here created is upon the *money* payable by the "owner" to the person entitled to the lien, and not upon the land. All creditors of the lien-holder entitled to give, and giving, notice under this section, stand on an equal footing and are entitled to a *pro rata* share of the amount payable by the owner to their common debtor. The Act of 1873, sec. 11, expressly provided that the owner should "thereupon pay the amount of such charge." The omission of these words, however, would not seem to alter the liability of the owner, as the fact that the person giving notice is entitled to a charge involves the right to enforce that charge by suit in default of payment by the owner.

Effect of payment of claim of sub-contractor by owner.

(*e*) "*If the owner thereupon pays.*" It would not be safe for an "owner" to pay any claim of which he receives notice under this section, without first informing the primary debtor of the claim, in order to give him an opportunity of disputing its validity if he desired to do so. Payments made by an "owner" to a creditor serving notice under this section, before such creditor's claim has been ascertained by arbitration, are at the risk of the "owner," and are only a valid discharge *pro tanto* of the lien, provided such indebtedness actually existed. (*See post sec.* 10, *p.* 26, *note b.*)

Disputes as claims against lien-holders, how to be adjusted.

9. In case of any dispute (*a*) as to the validity or amount of such unpaid account or demand, the same shall be first determined by suit in the proper Court in that behalf, or by arbitration under sections eighteen and nineteen, at the option of the person having such unpaid account or demand against the lien-holder; and during the pending of the proceedings (*b*) to determine

the dispute so much of the amount of the lien (*c*) as is in question therein may be withheld from the person claiming the lien. (36 V. c. 27, s. 11.)

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(*a*) "*In case of any dispute.*" The dispute here contemplated is a dispute between the creditor who gives notice under *section* 8, and his primary debtor. The option of having such dispute settled by suit or arbitration is reserved to the creditor giving notice, and in this case arbitration is not compulsory as provided by *section* 18. Under the Act of 1873 the dispute was to be settled by suit in the proper Court, the clause as to arbitration first appears in the Revised Statute.

Disputes as to claims of sub-contractors giving notice to owner, to be settled by suit or arbitration.

(*b*) "*During the pending of the proceedings.*" There must be a suit, or proceeding in arbitration, actually pending, in order to entitle the owner to withhold the money in dispute, from a lien-holder or other creditors giving notice. The mere existence of a dispute is not sufficient. It is therefore incumbent on the creditor giving notice, in the event of his claim being disputed, to proceed at once by suit or arbitration to settle the dispute.

Pending suit or arbitration payment by owner stayed.

(*c*) "*So much of the amount of the lien as is in question.*" The amount in question which the owner is entitled to withhold is so much of the money due by him to the lien-holder, as the creditor whose claim is disputed would be entitled to receive, assuming his claim to be correct.

Amount which owner to withhold.

10. In case the person primarily liable to the person entitled to the lien (*a*) fails to pay the amount awarded within ten days after the award is made, the owner, contractor or sub-contractor may pay the same out of any money due by him to the person primarily liable as aforesaid, on account of the work done or materials or machinery furnished or placed in respect of which the indebtedness arose; and such payment, if made after an award, (*b*) shall in all cases, or if made without

Failure to pay amount awarded.

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any arbitration having been previously had or dispute existing, then if the indebtedness in fact existed, (*c*) and to the extent thereof, operate as a discharge *pro tanto* of the moneys so due as aforesaid to the person primarily liable. (38 V. c. 20, s. 8.)

"Entitled to the lien."

(*a*) "*Entitled to the lien.*" This section departs from the phraseology of the preceding sections. The words "giving such notice" would seem to have been more appropriate here. The difference in the language is accounted for by the fact that the present section originally formed part of the Act of 1874, and in that Act, which first gave the right of lien to "sub-contractors," provision was made for the adjustment of disputes arising as to the liens of sub-contractors by arbitration (*see sections* 18 *and* 19), and the present section originally followed *section* 19. This section is now apparently intended to apply not only to arbitrations under *section* 18, but also to arbitrations under *section* 9. The words, "entitled to the lien," would therefore probably now be construed as including both sub-contractors having liens on the land and those who, under *section* 8, have a charge or lien upon the money payable by the owner to some other person in respect of the

Effect of payment of claim of lien-holder by party not primarily liable.

After award *pro tanto* discharge of lien.

After decree or judgment which is subsequently reversed *quære.*

(*b*) "*Such payment if made after an award.*" It will be observed that this section makes no provision for payments made after a judgment or decree in a suit brought by a creditor under *section* 9. The omission may be accounted for by the fact that the section formed part of the Act of 1874, and was originally intended to meet the case of payments to sub-contractors whose liens were disputed, and which, under the Act of 1874, (*see sections* 18 *and* 19) were in all cases to be settled by arbitration. It is therefore doubtful whether a payment made to a creditor serving notice under *section* 8, after a judgment or decree in his favour would protect the person paying him, should such judgment or decree be subsequently reversed. But a payment made after an award would appear to be clearly a protection to the payer as against the primary debtor, even though the award were subsequently set aside. The remedy of the latter in such case

would appear to be against the payee only. If the primary debtor intend to dispute the award, it would seem that he should at once institute a suit in Chancery to restrain the payment of the disputed claim by the "owner" or his own immediate debtor.

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(*c*) "*Then if the indebtedness in fact existed.*" If the "owner," "contractor," or "sub-contractor" assume to pay the claim of a creditor who serves notice under *section* 8, without an award being first made on the claim, such payment will not be a discharge of the indebtedness of the payer to the primary debtor, *pro tanto*, unless such creditor's claim in fact existed. It would therefore seem absolutely necessary for the security of the party making payment, without an award having been first made, that the admission of the primary debtor should be obtained to the correctness of his creditor's claim. The statute seems to cast the burthen of obtaining the admission on the "owner"; at all events, it makes no provision for the creditor procuring it, but only provides for the case of a dispute. It would have been more reasonable if the law had cast upon the creditor the duty of obtaining his debtor's admission of the correctness of his claim, or of establishing it by suit or award, and have protected all payments made after either judgment, decree, or award.

Payment made before award is no discharge of lien unless indebtedness in fact existed.

11. All payments [up to ninety per centum (*a*) of the price to be paid for the work, (*b*) machinery or materials, as defined by section three of this Act,] made in good faith (*b*) by the owner to the contractor, or by the contractor to the sub-contractor, or by one sub-contractor to another sub-contractor, before notice in writing by the person claiming the lien has been given to such owner, contractor or sub-contractor (as the case may be) of the claim of such person, shall operate as a discharge *pro tanto* of the lien created by this Act; but this section shall not apply to any payment made for the purpose of defeating or impairing a claim to a lien

Payments made *bona fide* before notice of claim of lien valid.

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existing or arising under this Act. (38 V. c. 20, s. 5.) (41 V. c. 17, s. 1.)

Payments not exceeding 90 per cent. of contract price protected in certain cases.

(*a*) "*Up to ninety per centum.*" The words within brackets were introduced by amendment. (*See* 41 Vic. c. 17, s. 1, *post* p. 49.) By section 2 of that Act all sub-contractors are entitled to a charge on the remaining ten per cent. of the price to be paid by the "owner," which is to endure for ten days after the completion of the work or furnishing of materials, without either registration or service of notice. In order to protect himself against this charge, an owner should take care to provide that ten per cent. of the contract price shall not be payable until at least ten days after the completion of the contract. Payments by the "owner" exceeding the ninety per cent., even if made pursuant to contract, are not protected as against the charge of "sub-contractors."

10 per cent. should be reserved on all sub-contracts.

(*b*) "*Of the price to be paid for the work.*" These words would seem to apply to the price to be paid under the contract, by virtue of which the payments are made, whether that contract be made between the owner and contractor, or between a contractor and a sub-contractor, or between one sub-contractor and another sub-contractor. The Act does not in terms state what is to be the effect of a sub-contractor making payment in excess of the ninety per cent. It is clear that the land of the owner could not be made chargeable therefor, except perhaps to the extent of any sum for which it might be liable to a lien in favour of the sub-contractor making such overpayment. The sub-contractor prejudiced by the overpayment, would also seem to have an equity to rank in the place of the party making the overpayment, on the ten per cent. of the price payable by the owner, on which a charge is created in favour of lien-holders by 41 Vic. c. 17, s. 2. (*See post p.* 50.)

Right of sub-contractor prejudiced by over payment by his debtor.

Payments must be made *bona fide.*

(*c*) "*Made in good faith.*" Registration of a lien will not invalidate payments subsequently made *bonâ fide* by a person on whom no written notice of the lien has been served, provided they do not in the aggregate exceed the ninety per cent. of the contract price. The reasonableness of this provision is apparent, for otherwise it would be incumbent on every "owner," "contractor," or "sub-contractor" not only to search

in the registry office for liens every time he might wish to make a payment to his "contractor" or "sub-contractor," but all such payments would have to be made in the Registry Office, for fear that between the search and the payment a lien might be registered. Only payments made in good faith are protected. Payments made for the purpose of defeating or impairing a claim to a lien existing or arising under the Act, would be void as against the person entitled to such lien.

Section 12.

Enforcement of lien in Division and County Courts.

12. When the amount of the claims (*a*) in respect of any lien is within the jurisdiction of the County or Division Courts respectively, proceedings to recover the same according to the usual procedure of the said Court by judgment and execution, may be taken in the proper Division Court, (*b*) or in the County Court of the county in which the land charged is situate; (*c*) or proceedings may be taken before the Judge of the said Courts, who may proceed in a summary manner by summons and order, and may take accounts (*d*) and make requisite enquiries, and in default of payment may direct the sale of the estate and interest charged at such time as the same can be sold under execution, (*e*) and such further proceedings may be taken for the purpose aforesaid as the Judge thinks proper in his discretion.

2. Any conveyance under the seal (*f*) of the County Court Judge shall be effectual (*g*) to pass the estate or interest sold.

3. The fees and costs in all proceedings taken under this section shall be such as are payable in respect of

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the like or similar matters, according to the ordinary procedure of the said Courts respectively. (36 V. c. 27, s. 5; 38 V. c. 20, s. 10.)

In what Court suit to enforce lien to be brought.

(*a*) "*When the amount of the claims.*" This must mean the aggregate amount of the claims of the lienholders *on the land.* (*See section* 15.) The aggregate amount of the claims of a contractor and his sub-contractors on the land, cannot exceed the original contract price agreed on between the "owner" and "contractor." In determining the Court in which a suit to enforce a lien should be commenced, the question would appear to be governed not by the amount of the plaintiff's own claim, but by the amount claimed to remain due by the "owner." Where this sum does not exceed $100, the Division Court would appear to have jurisdiction, (*see* 41 *Vic. c.* 8, *s.* 6), and where it exceeds $100, and does not exceed $400, and the amount is liquidated or ascertained by the act of the parties, or the signature of the "owner," or where the amount is not so liquidated or ascertained, and does not exceed $200, then the County Court has jurisdiction. (*See* "*The County Courts Act,*" *s.* 19). Where, however, an injunction is required to restrain the removal of any erection or machinery from the property over which the lien is claimed, the jurisdiction of the County Court to grant the relief is confined to cases where the amount claimed does not exceed $200. (*See section* 22.) Where a plaintiff in Chancery claimed by his bill that there was due from the "owner" a sum exceeding the jurisdiction of the County Court, but only recovered a sum within the jurisdiction of the Division Court, it was held that he was only entitled to costs according to the Lower Scale. (*Smith* v. *McDonald,* 25 Gr. 600.)

Division Court jurisdiction.

County Court jurisdiction.

Cases where injunction required.

Division Court.

(*b*) "*Proper Division Court.*" (*See* "*The Division Courts Act,*" *s.* 62.)

County Court.

(*c*) "*County Court of the County in which the land charged is situate.*" Where the land charged is situate partly in one county and partly in another, the County Court of neither county would appear to have jurisdiction, and in such a case the suit would have to be brought in Chancery.

Section 12.

Accounts to be taken in suits to enforce liens.

(*d*) "*And may take accounts.*" All suits brought by a lien-holder are to be taken to be brought on behalf of all the lien-holders of the same class. (*See section* 15.) An account must be taken not only of the claim of the lien-holder by whom the suit is brought, but also of the claims of all other lien-holders of the same class. The Act does not provide for their being actually made parties in suits brought in a Division or County Court, but they would clearly be entitled to notice of the proceedings and to prove their claims. It would also appear to be necessary to take an account of the claims of all other lien-holders and subsequent encumbrancers, who would be entitled to share in the proceeds of the sale, in the event of the interest of the owner in the land charged being sold. A day would also have to be appointed for payment by the "owner." In Chancery one month from the date of the Master's report is usually appointed, whether the estate or interest charged be a freehold or chattel interest, but where the suit is brought in a Division or County Court, it would appear that the Legislature intended that the "owner" should have at least a year allowed him for payment where the estate charged is a freehold. (*See infra, note e.*)

Time within which land c

(*e*) "*At such time as the same can be sold under execution.*" Where the estate charged is a leasehold or other chattel interest, the interest of the "owner" would be salable under a *fi. fa.* goods after eight days notice. (*See* "*The Execution Act,*" *s.* 19; "*The Division Courts Act,*" *s.* 174.) Where the estate however is a freehold, a sale could not take place under execution within less than twelve months from the day on which the writ against lands was delivered to the sheriff. (*See* "*The Execution Act,*" *sec.* 14, *ss* 2.) And no sale of freehold lands can be had under execution until after a return of "*nulla bona*" by the sheriff of the county in which such lands are situate. (*Ib. sec.* 15.) It does not seem probable, however, that the Legislature intended to require either the issue of a *fi. fa.* goods or a *fi. fa.* lands as a preliminary to a sale under this Act, although the time at which a sale of lands can take place under execution is really made dependent on the time at which such writs are delivered to the sheriff. The words, "at such time," &c, may possibly be taken to mean the limit of *eight days* or *twelve months* from the time the amount due by the owner is ascertained by the Court or Judge according as the estate charged is a chattel, or freehold interest.

Section 13.

Conveyance of land, where sale in Division or County Court.

(*f*) "*Any conveyance under the seal.*" The County Court Judge being *ex officio* Judge of the Division Court, all conveyances made in pursuance of the order of either the Division or County Court, are to be made by him. The statute only speaks of the seal, but the signature of the Judge should also be appended to the instrument.

Effect of deed.

(*g*) "*Shall be effectual.*" If the Court by which the sale was ordered had no jurisdiction under the Act to direct a sale, it is very doubtful whether this section would give validity to the conveyance. The consent of the parties cannot give the Court a jurisdiction which it does not by law possess, and *a fortiori* the passive acquiescence of the parties in the Court assuming jurisdiction would be equally ineffectual.

Procedure in Chancery.

13. In other cases the lien may be realized in the Court of Chancery according to the ordinary procedure of that Court. (*a*) (36 V. c. 27, s. 6: 38 V. c. 20, s. 11.)

Forms.

(*a*) For forms of bills and other proceedings in suits brought in Chancery see Appendix, *post p.* 57.

The Court may order sale and removal of machinery.

14. The said Judge or Court, (*a*) in his or its discretion, may also direct the sale of any machinery, (*b*) and authorize its removal. (36 V. c. 27, s. 7; 38 V. c. 20, s. 15.)

(*a*) "*The said Judge or Court.*" These words apply to any Judge or Court having jurisdiction to enforce the lien.

What machinery may be ordered to be sold or removed.

(*b*) "*Any machinery.*" This section authorizes the sale of machinery apart from the land on which it has been placed, notwithstanding the generality of the words "any machinery," machinery which is not subject to the claim of the lien-holder could not be ordered to be sold or removed under this section. (*See ante p.* 11, *note e.*) Neither is it probable that the jurisdiction hereby conferred would be exercised except in cases where it would be for the general benefit of all parties interested that the machinery should be sold apart from the land.

Section 15.

Suits by lien holders to be for benefit of lien-holders of the same class.

15. Any number of lien-holders may join in one suit, and all suits brought by a lien-holder shall be taken to be brought on behalf of all the lien-holders of the same class; (*a*) and in the event of the death of the plaintiff therein, or his refusal or neglect to proceed therewith, may, by leave of the Court in which the suit is brought, on such terms as may be deemed just and reasonable, be prosecuted and continued by any other lien-holder of the same class. (38 V. c. 20, s. 13.)

Suit by lien-holder to enure for benefit of all others of the same class. Who are "the same class"?

(*a*) "*Shall be taken to be brought on behalf of all the lien-holders of the same class.*" It is not necessary that all lien-holders should be made parties to the bill, but all those having liens at the date of the filing of the bill, who are not parties to the bill, must be added as defendants in the Master's office. (*See Hovenden* v. *Ellison*, 24 Gr. 448.) Lien-holders of "the same class" would appear to be those who have contracted with the same person, *e. g.*, all "contractors," are of the same class. (*See Bunting* v. *Bell*, 23 Gr. 584.) So also all sub-contractors who have contracted with the same "contractor" or "sub-contractor" are of the same class, but the "sub-contractor" of A cannot be said to be of the same class as the sub-contractor of B, nor are a "contractor" and any "sub-contractor" of the same class. (*See section* 17.) Difficulty will be sometimes found in ascertaining the lien holders entitled to be made parties to the proceeding from the fact that unregistered liens subsisting at the date of the institution of the suit appear to be kept in force as well as those that are registered. Where a lien-holder instituted a suit on the 7th July, within the prescribed time, but omitted to serve the bill, and subsequently on the 19th January following the bill was dismissed for want of service, but before its dismissal, on the 15th July, another lien-holder commenced a suit, it was held that the claim of the plaintiff in the suit commenced on the 7th July, was kept in force by the suit commenced on the 15th July. (*Bunting* v. *Bell*, 23 Gr. 584.) Lien-holders, although not parties to a suit, are bound to see that the suit is prosecuted to a decree, or it may be dismissed for want of

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prosecution, and if the time prescribed for bringing a suit have expired, their liens will be gone. After decree the suit of a lien-holder cannot be dismissed, even by consent of the plaintiff, the proper order in such a case is merely to stay the proceedings, but without prejudice to the right of any other lien-holder to intervene and assume the conduct of the cause. (*Arnbery* v. *Thornton*, 6 Pr. C. 190.)

It is doubtful whether any lien-holder could intervene and apply to carry on the suit whose claim was not actually payable at the time of the making of the application. (*Burritt* v. *Renihan*, 25 Gr. 183.)

Parties necessary to be added in Master's Office.

Not only lien-holders of the same class should be added as parties in the Master's office, but also all others having liens, or subsequent incumbrances, who would be entitled to share in the proceeds of the sale in the event of the property subject to the lien, being sold.

Death of lien-holder.

16. In the event of the death of a lien-holder his right of lien shall pass to his personal representatives, and the right of a lien-holder may be assigned (*a*) by any instrument in writing. (38 V. c. 20, s. 12.)

Assignee of lien-holder may sue.

(*a*) "*May be assigned.*" Where a mechanic assigned his interest, and subsequently took back a re-assignment of it in trust for his assignor, it was held, before this section was passed, that he was entitled to enforce the lien under the Act of 1873. (*Currier* v. *Friedrick*, 22 Gr. 243.)

Several liens of same class to rank *pari passu*.

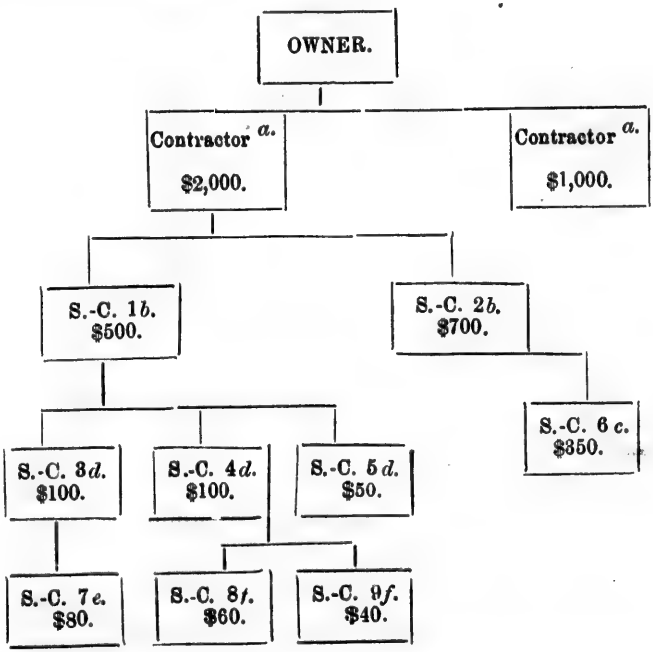
Proceeds of sale how to be distributed.

17. Where there are several liens under this Act against the same property, each class (*a*) of the lien-holders shall rank *pari passu* for their several amounts, and the proceeds (*b*) at any sale shall be distributed amongst them *pro rata*, according to their several classes and rights, (*c*) and they shall respectively be entitled to execution (*d*) for any balance due to them respectively after said distribution. (36 V. c. 27, s. 12; 38 V. c. 20, s. 9.)

Section 17.

Who are lien-holder of same class.

(*a*) "*Each class of the lien-holders.*" These words are apparently intended to mean each series of lien-holders who have contracted with the same person, whether he be "owner," "contractor," or "sub-contractor." (*See section* 15.) The following table will serve as an illustration. The letters S. C. are used to designate sub-contractors, and the italics indicate those of the same class, and the sums the amount of their respective contracts:—



Each sub-contractor can have no greater claim on the land than the person by whom he was employed, and where a contractor or sub-contractor has employed a "sub-contractor," the claim of such "sub-contractor" must be deducted from that of the person by whom he was employed. For example, the claims of the S. C. *b* must be deducted from the claim of the contractor, which would leave him only

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entitled to $800. So also the claims of S. C. 3 *d*, S. C. 4 *d*, and S. C. 5 *d* must be deducted from the claim of the S. C. 1 *b* through whom they claim, which would leave the latter only entitled to $250, and so on with regard to the other sub contractors.

Application of proceeds of sale. Costs to be first deducted.

(*b*) "*And the proceeds.*" That is, the net proceeds, after payment of the costs of the suit, (if any), and of the sale, otherwise the burthen of realising the claims of all parties would be cast upon the plaintiff or other party carrying on the proceedings.

Mode of distribution among lien-holders.

(*c*) "*Pro rata according to their several classes and rights.*" This does not appear to mean that in every case in which the sum realised from the land is insufficient to pay all the liens thereon, in full; that all liens are to abate in equal proportion, some liens may be paid in full, notwithstanding a deficient fund, *e. g.*, if the dividend payable to S. C. 3 *d*, as shewn above, were, but for his sub-contract with S. C. 7 *e* (say $90), the latter would appear to be entitled to be paid in full, and S. C. 3 *d* would have to bear the loss because he is indebted to S. C. 7 *e* in $80, and the latter stands in his place, to that amount. But lien-holders of the same class are entitled to a *pro rata* distribution, *e. g.*, if the dividend coming to S. C. 4 *d* were less than $100, his sub-contractors 8 *f* and 9 *f* would be entitled to a *pro rata* distribution of it, 8 *f* being entitled to three-fifths, and 9 *f* to two-fifths of the dividend.

Lien-holders entitled to execution for deficiency as against their primary debtor.

(*d*) "*Shall respectively be entitled to execution.*" The right of execution is against the primary debtor only. No execution would lie against the "owner," except in favour of a "contractor." The right to obtain execution is here given only after the distribution of the proceeds of the sale of the property subject to the lien; but a lien-holder may sue his debtor and recover judgment and execution without waiting until the property subject to his lien has been realised.

Disputed claims to be referred to arbitration.

18. In case a claim is made by a sub-contractor (*a*) in respect of a lien (*b*) to which he is entitled, and a dispute arises (*c*) as to the amount due or payable in respect thereof, the same shall be settled by arbitration. (*d*)

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2. One arbitrator shall be appointed by the person making the claim, one by the person by whom he was employed, and the third arbitrator shall be appointed (*d*) by the two so chosen.

3. The decision of the arbitrators or a majority of them shall be final (*e*) and conclusive. (38 V. c. 20, s. 6.)

(*a*) "*By a sub-contractor.*" This provision is confined to claims made by sub-contractors. As to persons coming within that designation (*See section* 2, *ss.* 2.)

(*b*) "*In respect of a lien.*" The claim of the sub-contractor must be made in respect to a lien to which he is entitled on the land, and not merely in respect of a charge upon the money payable by the owner under his contract, under *section* 8, or under 41 *Vic. c.* 17, *s.* 2, *post p.* 49.

Disputes as to claim of sub-contractors to liens on land to be settled by arbitration.

(*c*) "*A dispute arises.*" The dispute here contemplated is one between the "sub-contractor" and the person by whom he was employed.

(*d*) "*Shall be settled by arbitration.*" The word "shall" is imperative. (*See* "*The Interpretation Act,*" s. 8, ss. 2; *Rev. Stats.*, p. 3.)

Appointment of arbitrators.

(*e*) "*Third arbitrator shall be appointed.*" This section provides that the third arbitrator shall be appointed by the arbitrators chosen by the respective parties. *Section* 19 provides that in case either party refuse to appoint an arbitrator, or the two arbitrators appointed fail to agree on a third, the appointment may be made by a County Judge, but no provision seems to have been made empowering an arbitrator appointed by the County Judge for one of the parties, to join with his co-arbitrator in appointing a third arbitrator. *Section* 19 would probably be construed as aiding *section* 18, and to authorize the arbitrator appointed by the Judge, to appoint a third, although the point is not free from doubt.

Whether arbitrator appointed by Judge of County Court can join in appointment of a third *quære.*

Effect of award.

(*f*) "*Shall be final.*" It is only when the submission is by rule of Court, or can be made a rule of Court, or has the effect of a rule of

Section 19.

No relief against award except in equity.

Court, that the Courts have any jurisdiction to set aside an award on motion. (*Russell on Arbitration*, 5th ed., 648.) Here no provision is made for making the submission a rule of any Court. The only remedy of any party dissatisfied with an award made under this section would be by suit in Chancery. (*See Greenhill* v. *Church*, 3 Rep. Ch. 49; *Hamilton* v. *Bankin*, 3 DeG. & Sm. 782.) As to the grounds on which an award can be impeached in equity. (*See Russell on Arbitration*, 5th ed., 660 & 703; *Story's Equity Juris.*, 12th ed., ss. 1450-8, *and see Bateman* v. *Boynton*, L. R. 1 Chy. 359.)

FORM OF APPOINTMENT OF ARBITRATOR.

Form of appointment of arbitrator.

Whereas I, A. B., claim to be entitled to a lien upon the estate and interest of (*name of "owner"*) in (*describe the lands*), for and in respect of a claim of $, which I claim to be due to me by you for work done (*or* materials furnished), which claim you dispute. I do therefore hereby, and by virtue of the statute in that behalf, appoint C. D. of , an arbitrator, to determine all matters in dispute between us touching my said claim. And I do hereby require you, within three days after the service hereof, to appoint an arbitrator on your behalf, and in default of your so doing I shall apply to the Judge of the County Court of the county of (*the county in which the lands lie*) to appoint an arbitrator for you.

Dated this —— day of .

(*Signature of sub-contractor whose claim is disputed.*)

To (*name of debtor disputing the claim.*)

Refusal to appoint arbitrators.

19. In case either of the parties interested in any such dispute refuses or neglects within three days after notice in writing requiring him to do so, to appoint his arbitrator, or if the two arbitrators appointed (*a*) fail to agree upon a third, the appointment may be made by a County Judge of the County in which the lands

in respect of which the lien is claimed are situate. (*b*) (38 V. c. 20, s. 7.)

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(*a*) "*Or if the two arbitrators appointed.*" It is not clear whether these words are confined to two arbitrators appointed by the parties themselves, or whether they include the case of one arbitrator appointed by one of the parties, and the other by a County Judge. If the words are restricted to arbitrators appointed by the parties, then wherever one of the arbitrators is appointed by the Judge for a party making default, neither the County Judge nor the arbitrator appointed by him would appear to have power to appoint a third arbitrator. It will, however, be probably found that an arbitrator appointed by a Judge for one of the parties has by necessary implication all the powers of an arbitrator chosen by the parties themselves, including the right of joining in the appointment of a third arbitrator. (*See C. L. P. Act, secs.* 215 and 217.)

Appointment of arbitrators by Judge of County Court authorized in certain cases

(*b*) "*In which the lands, &c., are situate.*" Where the lands subject to the lien are partly in one county and partly in another. The Judge of neither County would appear to have jurisdiction.

Judge entitled to jurisdiction.

20. Every lien which has not been duly registered (*a*) under the provisions of sections four and five, shall absolutely cease to exist after the expiration of thirty days after the work has been completed, or materials or machinery furnished, unless in the meantime (*b*) proceedings are instituted to realize the claim under the provisions of this Act, and a certificate thereof (*c*) (which may be granted by the Judge or Court before whom, or in which the proceedings are instituted), is duly registered (*d*) in the Registry Office of the County or other Registration Division wherein the lands in respect of which the lien is claimed are situate. (38 V. c. 20, s. 14; 36 V. c. 27, s. 4.)

When unregistered lien shall cease.

Section 20.

Within what time lien must be registered.

(*a*) "*Not been duly registered.*" The registration of a lien for work must be made before or during its performance, or within thirty days after its completion, and a lien for materials or machinery, must be registered within thirty days after they have been furnished, or placed upon the land. (*See section* 4.)

Where lien not registered suit to be instituted.

(*b*) "*Unless in the meantime.*" It is not essential to the preservation of the lien that the proceedings should have been instituted by the lien-holder himself, it will be sufficient if they have been instituted by some other lien-holder of the *same class.* (*See section* 15. *Bunting* v. *Bell*, 23 Gr. 584; *Hovenden* v. *Ellison*, 24 Gr. 448.) But a suit by one lien-holder would not have the effect of reviving the lien of another lien-holder of the same class which had expired under this section for want of registration before the suit was commenced. In order to entitle a lien-holder to maintain a suit to enforce his lien, the period of credit between the "contractor" and "owner" must have expired. (*Burritt* v. *Renihan*, 25 Gr. 183,) and, *semble*, where the suit is brought by a "sub-contractor" the period of credit between him and the "contractor" or "sub-contractor" by whom he was employed, must also have expired.

Suit not maintainable till period of credit expired.

Certificate of *lis pendens* must be registered.

(*c*) "*A certificate thereof.*" This means a certificate that the proceedings have been commenced. The certificate should shew the names of the parties, plaintiff and defendant, to the suit, and should also accurately describe the land over which the lien is claimed, as it is described in the proceedings.

FORM OF CERTIFICATE OF LIS PENDENS.

In (*name of Court.*)

Form of certificate.

I certify that in a suit or proceeding in (*name of Court*) between A B, plaintiff, and C D and E F, defendants, some title or interest is called in question in the following land, (*describing it as in the bill of complaint or other proceedings.*

Dated at, &c.

As witness my hand, [and the seal of the said Court, *or* my office.]

(*Signature of Judge or Clerk.*)

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How to be authenticated.

The certificate in Chancery may be under the seal of the Court or under the seal of office (if any) of the officer signing the same. (*See "The Registry Act," s.* 49.) Where the seal of a Court of Record is affixed to the certificate, it proves itself, and can be registered without affidavit. (*See "The Registry Act," s.* 48, *Rev. Stat., p.* 1076.) But where the certificate is not under the seal of a Court of Record, *semble*, an affidavit of attestation is necessary. Division Courts are not Courts of Record. (*See "The Division Courts Act," R. S. O. c.* 47, *s.* 7, *but see Corsant q. t.* v. *Taylor*, 10 C. L. J. 321.)

Within what time certificate to be registered.

(*d*) "*Duly registered.*" The proceedings must not only have been commenced within the thirty days, but the certificate must have been registered within that period, or the lien will cease. Where the land in question is situate partly in two registration divisions, a certificate of the commencement of the proceedings must be registered in both divisions.

When registered lien shall cease.

21. Every lien which has been duly registered (*a*) under the provisions of sections four and five shall absolutely cease to exist after the expiration of ninety days after the work has been completed, or materials or machinery furnished, or the expiry of the period of credit, (*b*) unless in the meantime proceedings are instituted to realize the claim under the provisions of this Act, and a certificate thereof (which may be granted by the Judge or Court before whom, or in which the proceedings are instituted), is duly registered in the Registry Office of the County or other Registration Division wherein the lands in respect of which the lien is claimed are situate. (36 V. c. 27, s. 4.)

Time within which suit to

(*a*) "*Which has been duly registered.*" The preceding section having prescribed the time within which suit must be brought to enforce

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be brought where lien registered.

unregistered liens, the present section prescribes the time within which a suit must be brought to enforce a registered lien. By registering the claim within the thirty days after the completion of the work or furnishing of the materials, an additional period of sixty days is gained for commencing a suit to enforce the claim.

"Expiry of period of credit."

(*b*) "*Or the expiry of the period of credit.*" The period of credit between the "owner" and "contractor" may expire before that between a "sub-contractor" and the person by whom he is employed; in such a case it would seem that "the period of credit" intended by these words would be the latter period, as until that had elapsed, the lien-holder would not appear to be in a position to commence a suit to enforce his lien. (*See Burritt* v. *Renihan*, 25 Gr. 188.) At the same time it must be confessed that this construction creates an additional difficulty in the way of ascertaining when the land is free from liens, as it necessitates enquiry of each person who has registered a claim whether the period of credit between him and the person by whom he was employed has expired. The suit must have been commenced, and the certificate of *lis pendens* registered within the ninety days. A suit by any one lien-holder will keep alive all other liens of the same class, existing at the time of the commencement of the proceedings. (*See section* 15, *ante p.* 33, *note a.*)

Certificate of *lis pendens* to be registered.

Property affected by the lien not to be removed.

22. During the continuance of any lien, (*a*) no portion of the property affected thereby, or the machinery therein shall be removed to the prejudice of such lien; and any attempt at such removal may be restrained by application to the County Court or the Judge thereof, or the Court of Chancery respectively, according as the claim (*b*) is under or over the sum of two hundred dollars. (36 V. c. 27, s. 8; 38 V. c. 20, s. 16.)

When lien expires.

(*a*) "*During the continuance of any lien.*" A lien if unregistered before the expiration of thirty days from the completion of the work, or the delivery of the materials, will cease unless within that time

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proceedings have been instituted by the lien-holder or some other lien-holder of the same class, to realize the lien, and a certificate of such proceedings have been registered in the proper registry office. (*See section* 20.) A registered lien will cease at the expiration of ninety days from the completion of the work or delivery of the materials, or the expiry of the period of credit, unless proceedings are in the meantime commenced, and a certificate thereof registered as above mentioned. (*See section* 21.)

Court in which suit to be brought where injunction sought to restrain removal of property.

(*b*) "*According as the claim.*" It is not clear from the Act whether the words "the claim" are intended to apply to the individual claim of the lien-holder seeking relief, or whether they refer to the amount claimed to remain due from the "owner" for the satisfaction of the claims of all lien-holders. The latter would seem to be the real sum in question, where the suit is brought by a lien-holder. (*See ante section* 15.) The jurisdiction of the County Court for the purpose of this section is limited to $200. The result of this section would appear to be that wherever an injunction to restrain the removal of property subject to a lien is sought, it can in no case be obtained in a Division Court, but must be sought in cases, where the claim is under $200, in the County Court, and in all other cases in Chancery. There seems no good reason why the powers conferred by this section should not have been extended to the Division and County Courts in all cases within their respective jurisdiction.

Security may be given in lieu of lien.

23. Upon application to the County Court or the Judge thereof in claims under two hundred dollars,(*a*) and to the Court of Chancery in other cases, such Judge or Court may receive security or payment into Court in lieu of the amount of such claim, and may thereupon vacate the registry of such lien, or may annul the said registry upon any other ground. (*b*) (36 V. c. 27, s. 9; 38 V. c. 20, s. 17.)

"Claims under $200."

(*a*) "*In claims under two hundred dollars.*" In this section the word "claims" must refer to the claim of the individual lien-holder whose claim is sought to be vacated or discharged.

Section 24.

Vacating registered liens.

(*b*) "*Upon any other ground.*" Full authority is by this section given for the vacating or annulling of liens which have been improperly registered, or which have been satisfied, or for any other reason ought to be vacated.

FORM OF ORDER VACATING LIEN.

(*Style of cause.*)

Form of order vacating a lien.

Upon the application of (*owner*), in presence of the solicitor for the (*lien-holder*), and upon hearing read (*affidavits and other papers on which application founded*), it is ordered that the claim of (*name of lien-holder*) to a lien upon the estate or interest of (*name of owner*) in the following lands, viz., (*description of lands as in registered claim*), in respect of the following work (*or* materials), that is to say, (*describing it as in the registered claim*), done (*or* furnished) for (*name of person for whom work done or materials furnished*), on or before the day of , and in respect of which the sum of $ was claimed by the said (*lien-holder*), as due (*or* to become due), and which said claim was registered in the Registry Office of on the day of , at o'clock, as No. be, and the same is hereby vacated and discharged.

Wrongful claim or refusal to discharge, costs.

24. In any of the said cases, (*a*) the Court or Judge may proceed to hear and determine the matter of the said lien, (*b*) and make such order as seems just, and in case the person claiming to be entitled to such lien has wrongfully refused to sign (*c*) a certificate of discharge thereof, or without just cause claims a larger sum to be due than is found by such Judge or Court, the Judge or Court may order and adjudge him to pay to the other party such costs as the Judge or Court may think fit to award. (36 V. c. 27, s. 9; 37 V. c. 20, s. 17.)

(*a*) "*In any of the said cases.*" This section, in the Act of 1873, formed part of the preceding section. The words, "in any of the said cases,"

therefore would seem to refer to the cases referred to in that section, viz.: (1.) Cases in which application is made to vacate a lien on giving security, or paying money into Court; and (2) Cases in which application is made to vacate or annul a registered lien on any other ground.

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(*b*) "*Hear and determine the matter of the said lien.*" It is only the matter of the particular lien in dispute that is here referred to. Under this section, therefore, it would not appear to be intended, that the Court on a motion to vacate a lien should make an order for its realization by a sale of the property, even though the Court should find in favour of the lien-holder, as that might involve the rights of other lien-holders (if any) who would not be parties to the proceedings. All that can be determined and adjudicated upon is the validity of the particular lien in dispute.

On motion to vacate lien, Court cannot order sale of property even though lien upheld.

(*c*) "*Wrongfully refused to sign.*" The statute makes no provision requiring a lien-holder to pay for the registry of the discharge when signed. A lien-holder would be deemed to have wrongfully refused to sign, even though he did so under a *bonâ fide* belief that his claim was not satisfied or could be enforced, if such were not in fact the case.

25. Whenever any mechanic, artisan, machinist, builder, miner, contractor, or other person, has furnished or procured any materials (*a*) for use in the construction, alteration, or repair of any building, erection, or mine, at the request of and for some other person, (*b*) such materials shall not be subject to execution, (*c*) or other process, to enforce any debt, other than for the purchase thereof, due by the person furnishing or procuring such materials, (*d*) and whether the same have or have not been in whole or in part, worked into, or made part of, such building or erection. (36 V. c. 27, s. 13.)

Materials used in construction of buildings not to be subject to execution in certain cases.

(*a*) "*Any materials.*" It is only materials furnished or procured for use in the construction, alteration or repair of any building, erection

Material protected

Section 25. from execution.

or mine, at the request of and for some other person, that are protected from execution by this section. Machinery, except such as may be furnished for any of the purposes above mentioned, does not appear to be protected.

(*b*) "*At the request of and for some other person.*" These words limit the application of this section to material furnished or procured by "contractors" or "sub-contractors." Materials furnished or procured by an owner for the erection, alteration, or repair of a building on his own property, would not be within the section.

Executions as against which, material protected.

(*c*) "*Shall not be subject to execution.*" This section is not intended to exonerate the materials from all executions, but only from executions to enforce any debts, *due by the person by whom the material was furnished or procured*, excepting such as were incurred by the latter for the purchase of the materials. The proper construction of the Act appears to require that the words "any debt" should be qualified by the clause "due by the person furnishing or procuring such materials," for if the latter words were to be held only to qualify the words "other than for the purchase thereof," it would seem to follow that the materials of all buildings erected by one person for another, after the passing of the Act, are absolutely and indefinitely exempted from all liability to execution, whether it be against the owner or any other person, a result which, it is needless to say, could never have been intended. Although the Act does not protect the material from execution to enforce a debt incurred for the purchase thereof, it does not follow that the material will, in all cases, be salable, even under such an execution, that will depend on whether the material had, or had not, ceased to be the property of the debtor. After the material has become incorporated in the building, there is nothing in this section to exonerate it from liability to executions to enforce debts due by the "owner". But such executions will not defeat the rights of those who have, previously to the delivery of the writs to the sheriff, acquired a right of lien under this Act.

(*d*) "*Due by the person furnishing or procuring such materials.*" These words are to be read in connection with the previous part of this section, from which it will be seen that they refer only to persons furnishing or procuring materials for the specific purposes mentioned,

"*at the request of and for some other person.*" It is only against certain debts of such persons that material is protected. In other words, this section exempts the material from liability for certain debts due by the person *by whom* it is furnished or procured to be furnished, but does not exempt it from any debts due by the person *to, or for whom*, it is furnished or procured. For example, material furnished by a "contractor" for an "owner" would be free from the debts of the "contractor," except those incurred for the purchase of the material, but not from the debts of the "owner," so soon as the material should, by incorporation into his building, or otherwise, have become his property. Section 26.

26. Except so far as herein otherwise provided, (*a*) the provisions of "*The Registry Act*" shall not apply to any lien arising under the provisions of this Act. (38 V. c. 20, s. 18.) Application of Rev. Stat. c. 111.

(*a*) "*Otherwise provided.*" *See sections* 4, 20, 21.

SCHEDULE

(*Referred to in section 4.*)

STATEMENT OF CLAIM. (*a*)

A. B , of under "*The Mechanics' Lien Act,*" claims a lien upon the estate or interest of C. D. of , in respect of the following work (*or* materials), that is to say, , which work was (*or* is to be) done (*or* materials were furnished) for the said C. D. on or before the day of .

(*a*) The form here given omits to require the claimant to state when the amount of his claim is payable. This omission makes it impossible to ascertain by searching the registered claim when the period for bringing a suit to enforce the lien will run out, as there will be nothing on the registry to shew when the period of credit, if any, will expire. (*See section* 21.) Defect in statutory form.

The amount claimed as due, or to become due, is the sum of dollars.

The description of the lands to be charged is the following: (*Description of land.*)

Dated at , this . day of , A.D. 18 .

(36 V. c. 27, *Sched.*)

41 VICTORIÆ CHAPTER 17.

"An Act to amend the Mechanics' Lien Act."

[*Assented to 7th March*, 1878.]

WHEREAS it is desirable to afford greater protection to the earnings of the working Mechanics, Labourers, and suppliers of material, than is now provided by law; 41 V. c. 17, s. 1.

Therefore, Her Majesty, by and with the advice and consent of the Legislative Assembly of the Province of Ontario, enacts as follows:—

1. Section eleven of the Revised Statutes of Ontario, chapter one hundred and twenty, intituled "An Act to establish Liens in favour of Mechanics, Machinists, and others," is hereby amended as follows:— Rev. Stat c. 120, s. 11, amended.

11. All payments, up to ninety per centum of the price to be paid for the work, machinery, or materials, as defined by section three of this Act, made in good faith by the owner to the contractor, or by the contractor to the sub-contractor, or by one sub-contractor to another sub-contractor, before notice in writing by the person claiming the lien has been given to such

41 V. c. 17, s. 1-2.

owner, contractor, or sub-contractor (as the case may be), of the claim of such person, shall operate as a discharge *pro tanto* of the lien created by this Act, but this section shall not apply to any payment made for the purpose of defeating or impairing a claim to a lien existing or arising under this Act. (*)

Lien to extent of 10 per cent. when a charge.

2. The said lien shall, in addition to all other rights or remedies given by the said Act, also operate as a charge (*a*) to the extent of ten per centum of the price to be paid as aforesaid by such owner, (*b*) up to ten days after the completion of the work in respect of which such lien exists, or of the delivery of the materials, and no longer, unless notice in writing (*c*) be given as hereinbefore provided.

Charge in favour of sub-contractors on 10 per cent. of price payable by owner to contractor.

(*a*) "*Operate as a charge.*" It can hardly be supposed that the statute intended to create a charge in favour of contractors upon money which they are entitled to by contract. The charge therefore created by this section must have been intended for the benefit of "sub-contractors," and to enable them to intercept money due from the owner to the contractor. Where there are several sub-contractors, each, according to his class, would be entitled to a *pro rata* share of the ten per cent., upon which a charge is here given. (*See ante* p. 34.)

(*b*) "*To be paid as aforesaid by such owner.*" The charge hereby created is upon ten *per centum* of the price to be paid by the owner. There is no charge in terms created upon money due to a "sub-contractor" from a "contractor" or another "sub-contractor," but the right of any sub-contractor to participate in the ten per cent. of the

(*) *See ante* page 27.

price to be paid by the owner, would however appear to be subject to the charge of any sub-contractor to whom he might be indebted. And where a "contractor" pays his immediate "sub-contractors" in advance, and such payments exceed the ninety *per centum* of the price to be paid by the owner, any person who has been employed by the sub-contractors who have been so overpaid, would seem to have an equity, to stand in the place of the contractor, and to receive from the "owner" so much of the ten per cent. as he has lost by reason of the contractor making such payment in advance.

41 V. c. 17, s. 3.

Effect of over payment by contractor or sub-contractor.

(c) "*Unless notice in writing.*" The notice referred to is that mentioned in the preceding section. If the notice be not given within ten days after the work has been done, or materials furnished, by the person giving it, it must be given before the payment is made by the "owner," otherwise the payment, if made in good faith, will be protected under the preceding section.

Notice to be served or charge to cease.

3. Every mechanic or other person who has bestowed money or skill and materials upon any chattel or thing in the alteration and improvement in its properties, or for the purpose of imparting an additional value to it, so as thereby to be entitled to a lien (*a*) upon such chattel or thing for the amount or value of the money or skill and materials (*b*) bestowed, shall, while such lien exists, but not afterwards, in case the amount to which he is entitled remains unpaid for three months (*c*) after the same ought to have been paid, (*d*) have the right, in addition to all other remedies provided by law, to sell the chattel (*e*) or thing in respect of which the lien exists, on giving one week's notice (*f*) by advertisement in a newspaper published in the municipality in which the work was done, or in case there is no newspaper pub-

41 V. c. 17, s. 3.

lished in such municipality, then in a newspaper published nearest thereto, stating the name of the person indebted, the amount of his indebtedness, a description of the chattel or thing to be sold, the time and place of sale, and the name of the auctioneer; and after such sale, such mechanic or other person shall apply the proceeds of such (*g*) in payment of the amount due to him and the costs of advertising and sale, and shall pay over the surplus (if any) to the person entitled thereto on application being made to him therefor, and leaving a like notice (*h*) in writing at the last or known place of residence (if any) of the owner, if he be a resident of such municipality.

Liens on chattels, who entitled to.

General lien.

Particular lien.

(*a*) "*So as thereby to be entitled to a lien.*" At common law there are two kinds of liens on chattels, viz., general liens, and particular liens. A general lien is a right to retain chattels, not merely for work or money expended on the specific chattels retained, but also for the general balance of account due by the owners to the lien-holder. A particular lien is the right to retain a chattel for the work or money expended on it. At common law the lien of a mechanic on chattels, independent of any contract, expressed or implied, is particular and not general. (*See Phillips on Mechanics' Liens, ss.* 470-1.) The right of particular lien exists, when there is no agreement to the contrary, in every case where a bailee for hire has by his labour and skill, or by the use of any instrument over which he has control imparted additional value to the goods of another. (*See Cross on Lien.* 24 *Phillips on Mechanics' Liens, s.* 474; *Jackson* v. *Cummins*, 5 M. & W. 342.)

Particular liens only, within Act.

The Act is confined to the case of particular liens, and only authorizes a sale for the satisfaction of claims for money, work, or materials bestowed in the alteration and improvement of the particular chattel

sold. It does not authorize the sale of chattels to enforce a general lien existing thereon. 41 V. c. 17, s. 3.

(*b*) "*Shall while such lien exists.*" The lien exists only so long as the lien-holder retains possession of the chattel, and his claim for work and material bestowed thereon, is unpaid. The parting with possession is a surrender of the right of lien, even though the claim remain unpaid, and so also is the release of the debt, even though possession of the chattel be retained. The possession must be continuous. Thus where a mechanic had repaired a carriage and allowed it to remain in his yard, but the owner had frequently taken it out of the yard, and returned it; it was held that the mechanic could not afterwards retain it for the amount of the repairs. (*Hartley* v. *Hitchcock*, 1 Starkie 408.) But where A. sent a waggon to B. to make certain wood work therefor, and B. having finished the wood work sent the waggon in A.'s name to another mechanic to do the iron work, and subsequently got back the waggon, and upon A.'s calling for the waggon, allowed him to remove the box to the highway, but on his returning for the running part refused to let it go until he was paid his bill; it was held that B. had not absolutely lost his lien by sending the waggon to the blacksmith, and that it had revived on his again obtaining possession, and that allowing A. to move the box to the highway was no waiver of his lien. (*Milburn* v. *Milburn*, 4 U. C. Q. B. 179. *But see McNeil* v. *Keleher*, 15 C. P. 470.)

Duration of lien.

Possession essential.

When the work is done on credit, and the period of credit has not expired before the goods are to be delivered, no lien exists. (*See Cross on Lien*, 43.) But it is said, if the bailee retain possession, and the owner become bankrupt before the period of credit is expired, the lien would attach as against the assignee. (*See Phillips on Mechanics' Liens*, *s*. 499.) But such lien, if any, could not prevail against a person to whom the chattel may in the meantime have been sold by the owner. (*Crawshay* v. *Homfray*, 4 B. & Ald. 50.) The taking of a security payable at a future day in the absence of an agreement to the contrary, puts an end to the lien. (*See Dempsey* v. *Carson*, 11 C. P. 462.)

When credit given.

The possession must be lawful, or there will be no lien. Where one wrongfully obtains possession of chattels and delivers them to a third

Possession must be lawful.

41 V. c. 17, s. 3.

party who bestows money, skill or materials thereon, the latter would have no lien as against the rightful owner. (*See Hartop* v. *Hoare*, 3 Atk. 43.) The lien can only arise by virtue of a contract express or implied with the owner or his agent. (*See Phillips on Mech. Liens, ss.* 494, 497.) A sub-contractor has no right of lien which could be enforced under this section. (*Ib. s.* 496.)

(*c*) "*Three months*," *i.e.*, calendar months. (*See* "*The Interpretation Act*," *R. S. O.* c. 1, s. 8, ss. 15.)

(*d*) "*After the same ought to have been paid.*" Where credit is given, and the right of lien is preserved by express agreement, the three months will not commence to run until the expiration of the period of credit.

Lien-holders entitled to sell chattel.

(*e*) "*To sell the chattel.*" Prior to the passing of this Act a person acquiring a lien on a chattel for work done, had only a right to retain it in his possession until his claim was paid by the owner, the present Act enables him to realize the amount due to him, by a sale of the chattel. It would seem that the lien-holder cannot himself be the purchaser at the sale. (*See King* v. *England*, 4 B. & S. 782; *Williams* v. *Grey*, 28 C. P. 561; *Burnham* v. *Waddell*, 28 C. P. 263.)

Notice to be given.

(*f*) "*On giving one week's notice.*" A week should elapse from the date of the first publication of the notice before the sale. The notice should strictly follow the Act, any material omission might invalidate the sale and subject the vendor to an action for damages. (*See Shultz* v. *Reddick*, 43 U. C. R. 155.)

FORM OF NOTICE OF SALE TO BE PUBLISHED AND SERVED ON OWNER.

AUCTION SALE.

Form of notice.

Whereas [*name of person indebted*] is indebted to the undersigned in the sum of $ for [work done and materials supplied in the alteration or improvement of one spring waggon] and three months have elapsed since the said sum ought to have been paid, and default has been made in payment thereof, notice is hereby given that on

next the day , at [*place of sale, e.g.*, the auction rooms of C. D., No. 6 King Street West, in the City of Toronto,] the said *describe chattel*] will be sold by [*name of auctioneer*] by public auction.

(*If the sale is to be subject to a reserve bidding or other special condition, it should be so stated.*)

Dated, &c. (*Signature of lien-holder.*)

To (*name of owner*) and all whom it may concern.

(*g*) "*The proceeds of such.*" The word "sale" is here intended to be understood.

Notice to be served on owner.

(*h*) "*And leaving a like notice.*" The sentence commencing with these words has been accidentally misplaced. The evident intention was, that it should follow the word auctioneer, as it is hardly possible to suppose that the Legislature intended the notice of sale to be given to the owner after the sale had taken place. Notwithstanding the transposition of the concluding sentence, the section would probably be construed as requiring a copy of the notice of sale to be left at the last known place of residence (if any) of the owner if he be a resident of the municipality where the work was done, a week before the sale.

APPENDIX.

(1) FORM OF BIIL TO ENFORCE MECHANICS' LIEN BY CONTRACTORS.

In Chancery.

Between—J. E. and W. B.....Plaintiffs,

and

M. A. T. .....Defendant.

City of Toronto.

To the Honourable the Judges of the Court of Chancery.

The bill of complaint of J. E., of the city of Toronto, in the county of York, builder, and W. B., of the same place, bricklayer, Bill by contractor.

Sheweth:

1. On the 11th day of November, 18 , the defendant was, and she has ever since remained and now is the [owner in fee simple of the lands and *or* lessee of certain leasehold] premises in the city of Toronto, in the county of York, more particularly described in the claim or lien hereinafter set forth. (*a*)

2. On or about the said 11th day of November, the plaintiffs, who are mechanics, were employed by the said defendant to perform certain work and to furnish certain materials for the erection of a brick hotel upon the said land for the said defendant, and there was no agreement between the said defendant and the plaintiffs that the plaintiffs should not be entitled to a lien npon the said lands and buildings for the price of the said work and materials.

3. In pursuance to the said employment, the plaintiffs did do a large amount of work upon and did furnish large quantities of materials, which were used in and about the erection of the said brick hotel

(*a*) If the lien has not been registered, this paragraph should set forth the lands upon which the lien is claimed, and should be modified accordingly.

upon the said lands, to the value of $18,000, and completed the same on the 4th day of September, 18 , whereby the defendant became indebted to the plaintiffs for the said work and materials in the said sum of $18,000.

4. The sum of $15,000 has been paid on account of the said sum of $18,000, leaving a balance of $3,000 still due and payable to the plaintiffs.

5. By reason of being so employed, and doing the said work, and furnishing the said materials, as aforesaid, the plaintiffs became and are entitled to a lien on the estate and interest of the defendant in the said lands for the said sum of $3,000, under the provisions of "*The Mechanics' Lien Act.*"

6. On the 21st day of September, 18 , the plaintiffs, in pursuance of the said Act, caused to be filed in the Registry Office in and for the city of Toronto a statement of their said claim, which statement is in the words and figures following, that is to say:

"J. E., of the city of Toronto, in the county of York, builder, and W. B., of the same place, bricklayer, under '*The Mechanics' Lien Act,*' claim a lien upon the estate or interest of M. A. T., of the said city of Toronto, in respect of the following work and materials, that is to say:

To amount of contract		$17,000
Bill of extras.		
To extra stone in foundation		500
" Brick pointing		200
" Second flats of extra ½-bricks in thickness		300
		$18,000
1873.		
Dec. 1.—By cash	$2,000	
" 22.— "	1,000	
1874.		
Jan. 5.— "	5,000	
July 6.— "	7,000	
		$15,000
Balance		$ 3,000

which work was done and materials were provided for the said M. A. T. on or before the 4th day of September, A.D. 18 , the amount claimed to be due or to become due is the sum of $3,000; the description of the land to be charged is as follows:—All and singular that certain parcel of land known as lot 3, on the west side of John Street, as shown on the plan of J. S. Dennis, P. L. S., registered in the Registry Office of the said City of Toronto, and numbered D 63.

Dated at the city of Toronto, in the county of York, this 21st day of September, A. D. 18 .

Witness, *Signed* J. BARNES } *Signed* J. E. *Signed* W. B.

—which statement was verified by an affidavit of the plaintiffs, sworn before a commissioner for taking affidavits in the said county of York, as required by the said statute. (*a*)

7. The lands referred to in the first paragraph of this bill, and particularly described in the said claim or lien hereinbefore set forth, are the lands occupied by and usually enjoyed with the said hotel.

The plaintiffs therefore pray:

1. That the defendant may be ordered to pay to the plaintiffs forthwith the said sum of $3,000, together with the interest thereon and the costs of this suit.

2. And that in default of such payment, all the estate and interest of the defendant in the said lands and buildings, or a competent part thereof, may be sold, and the proceeds thereof applied in or towards payment of the plaintiffs'

(a) It is necessary to show that a claim for work was registered before or during its progress, or within thirty days after its completion, and that a lien for materials or machinery was registered within thirty days of the delivery thereof, unless the suit be commenced, and a certificate of *lis pendens* be registered within thirty days from the completion of the work or delivery of the materials or machinery, in which case registration of the claim before suit is unnecessary.

debt and the costs of this suit, pursuant to the said "*The Mechanics' Lien Act.*"

3. That for the purposes aforesaid all proper directions may be given and accounts taken.

4. And that the plaintiffs may have such further and other relief as to this Honourable Court may seem meet.

And the plaintiffs will ever pray.

(2) FORM OF BILL TO ENFORCE A MECHANICS' LIEN BY A SUB-CONTRACTOR.

In Chancery.

Between J. E., Plaintiff.

and

M. A. T. (*Owner,*) C. D. (*Contractor,*) and E. T. (*Sub-contractor by whom plaintiff employed,*)—Defendants.)

(*Formal parts as in preceding form.*)

Bill by sub-contractor.

1. On the 11th day of November, 18 , the defendant, M. A. T., was and she has ever since remained and now is the [owner in fee simple of the lands and, *or* lessee of certain leasehold] premises in the City of Toronto, in the County of York (*if the plaintiff's lien has been registered, conclude as in preceding form, if not, say*) known and described as follows, that is to say: (*set out description of land over which lien is claimed.*)

2. On or about the said 11th day of November, the said defendant, M. A. T., employed the defendant, C. D., to perform certain work and to furnish certain materials for the erection of a house upon the said land for the said defendant, M. A. T., for the price or sum of $10,000, and there was no agreement between the said M. A. T. and the said C. D., that the said C. D., or any sub-contractor under him, should not be entitled to a lien upon the said lands and buildings for the price of the said work and materials, or any part thereof, or between the plaintiff and the said M. A. T., that the plaintiff should not be entitled to such lien for the work done and materials furnished by him, as hereinafter mentioned.

3 The defendant, C. D., accepted the said employment, and agreed with the said M. A. T. to perform the said work and to furnish the said materials, and afterwards employed the defendant, E. T.. to do part of the said work and furnish part of the materials required for the erection of the said house, for the sum of $1,000, which employment the defendant E. T. accepted, and he agreed with the said C. D. to do the work and furnish the materials last referred to for the said price or sum of $1,000.

4. On the 11th day of December, 18 , the defendant, E. T., employed the plaintiff to do part of the work and furnish part of the materials for the erection of the said house which he had so agreed with the said defendant, C. D., to do and furnish as aforesaid, and agreed to pay the plaintiff therefor the price or sum of $500.

5. The plaintiff accepted the said employment, and in pursuance thereof the plaintiff did do a large amount of work upon, and did furnish large quantities of material in and about the erection of, the said house upon the said lands to the value of $500, and completed the said work and the delivery of the said materials on the 5th day of January, 18 , whereby the defendant, E. T., became indebted to the plaintiffs for the said work and materials in the said sum of $500.

6. The said work was done, and the said materials were furnished by the plaintiff in accordance with the terms of the contract or agreement between the said defendants M. A. T. and C. D.

7. The sum of $100 has been paid by the said E. T. on account of the said sum of $500, leaving a balance of $400 still due and payable by him to the plaintiff.

8. By reason of being so employed, and doing the said work and furnishing the said materials as aforesaid, the plaintiff became and is entitled to a lien on the estate and interest of the defendant M. A. T. in the said lands for the said sum of $400, and also to a charge therefor upon ten per centum of the price so to be paid by the said defendant M. A. T. to the defendant C. D. under the provisions of the said "*The Mechanics' Lien Act,*" and the Act amending the same.

9. [*If the lien were registered proceed as in paragraph* 6 *of preceding form.*)

10. The lands referred to in the first paragraph of this bill [*if so* and particularly described in the said claim or lien hereinbefore set forth] are the lands occupied by and usually enjoyed with the said house.

11. The defendants C. D. and E. T. have also done work and furnished materials in and about the erection of the said house and are entitled to liens in respect thereof upon the said lands under the said "*The Mechanics' Lien Act.*"

The plaintiff therefore prays:

1. That the defendant E. T. may be ordered to pay to the plaintiff forthwith the said sum of $400, together with interest and the costs of this suit.

2. And that the defendant M. A. T. may also be ordered to pay the same or such part thereof as the plaintiff, by virtue of his said lien and charge as aforesaid, is entitled to receive from the said M. A. T.

3. And that in default of such payment by the said M. A. T. and the said E. T. that all the estate and interest of the defendant M. A. T. in the said lands and buildings, or a competent part thereof, may be sold, and the proceeds applied in or towards payment of the plaintiff's debt and the costs of this suit, pursuant to the said "*The Mechanics' Lien Act.*"

4. That for the purposes aforesaid all proper directions may be given and accounts taken.

5. And that the plaintiff may have such further and other relief as to this Honourable Court shall seem meet.

And the plaintiff will ever pray.

(3) FORM OF DECREE IN SUIT BY CONTRACTOR.

In Chancery.

V. C. WEDNESDAY, the day of 18 .

Between G. F. ..... Plaintiff.

and

The W. H. Company (*Limited*), Defendants.

Decree in suit by contractor.

This cause coming on to be heard this day in the presence of counsel for the plaintiff, no one appearing for the defendants, although duly notified as by admission of service appears, upon opening of the matter, and upon hearing read the plaintiff's bill of complaint, and upon hearing the defendants' answer thereto, and upon hearing what was alleged by the counsel aforesaid,

1. This Court doth declare that the plaintiff has a lien upon the estate and interest of the defendants in the lands and premises in the pleadings mentioned under "*The Mechanics' Lien Act*," for so much of the value of the materials provided, and work done, as set forth in the bill of complaint in this cause as remains justly due from the defendants to the said plaintiff, and doth order and decree the same accordingly.

2. And this Court doth further order and decree that it be referred to the Master of this Court at Guelph to enquire and state whether any person or persons, and who other than the plaintiff, except prior mortgagees (if any), has or have any lien, charge or incumbrance upon the estate and interest of the defendants in the said lands and premises, and in case the said Master shall find that any person or persons other than the said plaintiff (except prior mortgagees, if any) has or have any such lien, charge or incumbrance, then he is to cause such person or persons to be made party defendants to this suit in his office, and is to proceed to take an account of the amount due to the said plaintiff, and such other incumbrancer or incumbrancers (if any) for principal and interest, and to tax to them their costs of this suit, and also to settle their priorities.

3. And upon the defendants, (*i. e., the owners,*) paying the amounts which the said Master shall find to be due and payable by them to the

plaintiff, and such other incumbrancer or incumbrancers (if any) into the Canadian Bank of Commerce at its office, in the City of Toronto, to the joint credit of the plaintiff, and such other incumbrancer or incumbrancers (if any) respectively, and the Referee in Chambers of this Court, as the said Master shall direct (at such time and place as the said Master shall appoint), within one month (*a*) after the said Master shall have made his report. This Court doth order and decree that the said plaintiff, and such other incumbrancer or incumbrancers (if any) do release and discharge their said liens, or convey and assign the said premises free and clear of all incumbrances done by them, and deliver up all deeds and documents in their respective possession or power relating thereto upon oath to the said defendants, or to whom they shall appoint or enter up satisfaction upon the rolls of their judgments, as the case may require.

4. But in default of the said defendants making such payments by the time aforesaid, this Court doth order and decree that the estate and interest of the said defendants in the said premises be sold by public auction, tender or private contract, with the approbation of the said Master, and the purchasers are to pay their purchase money into Court to the credit of this cause, and the said Master is to settle the conveyances to the purchasers in case the parties differ about the same in which all proper parties are to join as the said Master shall direct.

5. And this Court doth further order and decree that the purchase money, when so paid in, shall be applied first in payment to the said plaintiff of his costs of this suit; second, in payment to the plaintiff and such other incumbrancer or incumbrancers (if any) of the amount the said Master shall find due and payable to them by the said defendants (*owners*) for principal money and interest and costs (other than the costs of the plaintiff, as aforesaid), according to their priorities, and the residue of the purchase money, if any, is to be paid to the said defendants.

6. But in the event of such purchase money being insufficient to pay the claim of the plaintiff, this Court doth order and decree that the defendant (*naming the primary debtor of the plaintiff*) do pay to the

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(*a*) *See section* 12, *notes d, e, ante p.* 31.

plaintiff the amount remaining due to him forthwith after service upon him of this decree and the Master's certificate of such deficiency. (*a*)

4) FORM OF DECREE IN SUIT BY SUB-CONTRACTOR. (*b*)

(*Formal parts as ante, No.* 3.)

Decree in suit by sub-contractor.

1. This Court doth declare that the plaintiffs are entitled to a lien and charge upon the estate and interest of the defendant (*the owner*) in the lands and premises in the plaintiffs' bill mentioned, and upon the buildings and erections upon the same, by virtue of "*The Mechanics' Lien Act*," for so much of the price of the work done upon, or materials furnished, or provided, by the plaintiffs, in and about the buildings erected upon the said lands as remains justly due to the said plaintiffs, to the extent of the whole or such part of the amount, if anything, due by the defendant (*the owner*) to the defendant (*the contractor*) upon his contract in said pleadings mentioned, as the plaintiff may be found entitled to, which amount is to be ascertained as hereinafter directed, and doth order and decree the same accordingly.

2. And this Court doth further order and decree that it be referred to the Master of this Court to take the following accounts:—1st. An account of the amount due from the said defendant (*the owner*) to the defendant (*the contractor*) in the pleadings mentioned, in respect of all work done upon, and materials provided for the erection of the buildings upon the lands in the pleadings mentioned; and in the event of the said Master finding that there is any sum still due by the said defendant (*the owner*) to the said defendant (*the contractor*), or that there was any sum remaining due from the said defendant (*the owner*) to the said defendant (*the contractor*) after receiving notice in writing of the plaintiffs' said lien, then the said Master is to take the following further account. 2nd. An account of the amount due from the said defendant (*the contractor*) to the plaintiffs in respect of all work done and materials provided by the plaintiffs for the said building.

(*a*) Where other claims in respect of mechanics' liens are proved, the lien-holders are entitled to have execution against their primary debtor, but a special application to the Court on petition or motion is necessary to obtain this relief.

(*b*) *See Hoverden* v. *Ellison*, 24 Gr. 448.

3. And in the like event this Court doth further order and decree that the said Master do enquire and state whether any person or persons, and who other than the said plaintiffs, (other than prior mortgagees) has or have any lien, charge, or encumbrance upon the said lands and erections thereon, under "*The Mechanics' Lien Act*," or otherwise; and in case the said Master shall find that any such person or persons, has or have any such lien, charge, or encumbrance, he is to cause them to be made parties to this suit and served with process under the General Orders of this Court, and is to proceed to take an account of what is due to the said plaintiffs upon and in respect of the said lien, and to such other encumbrancers (if any) and to settle their priorities.

4. And this Court doth reserve further directions and the question of costs until after the said Master shall have made his report.

(5) FORM OF DECREE ON FURTHER DIRECTIONS IN SUIT BY SUB-CONTRACTOR.

(*Formal parts as in form No.* 3.)

Decree on further directions in suit by sub-contractor.

1. This Court doth order and decree that the defendants, A. B. & C. D., ("*owners*"), do forthwith pay into Court, to the credit of this cause, the sum of $396.40 less their costs of this suit, which have been taxed and certified at the sum of $84.80.

2. And this Court doth further order and decree that the said moneys so to be paid into Court, be applied and paid out as follows:—1. In payment to the plaintiff of his costs of this cause, which costs have been taxed and certified at the sum of $. 2. To the defendants, J. B. and G. F., (*lien-holders*), their costs of this cause, which costs have been taxed and certified at the sum of $.

3. And this Court doth further order and decree that out of the balance remaining in Court to the credit of this cause, after the payment aforesaid, the sum of $ be paid out to the said plaintiff, the sum of $ to the said defendants, J. B. and G. F., and the sum of $ to the said defendants, J. P. & S. S.

4. And this Court doth further order and decree that the lands and premises and the erections thereon of the said defendants, A. B. and

C. D., (*owners*), in the pleadings in this cause mentioned, be, and they are, hereby declared to be freed and clear of all liens, charges and incumbrances created by the registration of the liens registered by the several parties to this cause.

5. And this Court doth further order and decree that the said defendants, W. C. and R. C., (*contractors by whom the plaintiff employed*), do forthwith pay to the plaintiff the sum of $592.20, with interest thereon from the 6th day of March inst., and to the defendants, J. B. and G. F., the sum of $313.36, with interest thereon from the 6th day of March inst., and to the defendants, J. P. and S. S., the sum of $16.53, with interest thereon from the said 6th day of March inst., the said last mentioned sums being the balances remaining due to the said parties respectively in respect of their mechanics' liens after deducting the amounts hereinbefore directed to be paid to them. (*a*)

(6) FORM OF DECREE WHERE RELIEF GRANTED AGAINST A MORTGAGEE UNDER SECTION 7 (*b*.)

(*Formal parts as in No.* 3.)

1. This Court doth declare that the plaintiffs have a lien upon the lands and premises in the bill of complaint mentioned under "*The Mechanics' Lien Act*," for so much of the price of the work done and materials furnished and expended by them in the construction and erection of the buildings upon the said lands under the contract and agreement in the said bill mentioned, as remains justly due from the defendant (*the owner*) to the said plaintiffs, and doth order and decree the same accordingly.

2. And this Court doth further order and decree that it be referred to the Master of this Court to enquire and state whether any person or persons, and who other than the said plaintiffs, (except prior mortgagees, if any,) has or have any valid lien, charge, or encumbrance upon the said land and premises, and in case he shall find that any such person or persons has or have any such lien, charge, or encumbrance, then he is to cause such person or persons to be served with

(*a*) The order for payment of the deficiency is made against the primary debtor only.

(*b*) *See Downer* v. *Mix*, D. B. 31, fo. 392.

process under the General Orders of this Court, and is to take an account of the amount due the said plaintiffs, and such other encumbrancer or encumbrancers (if any) for principal and interest, and to tax to them their costs of this suit and settle their priorities, and upon the said defendant, (*the owner*) paying the amounts which the said Master shall find to be due to said plaintiffs and such other encumbrancer or encumbrancers as aforesaid (if any) within one month after said Master shall have made his report at such time and in such manner as the said Master shall direct. This Court doth order and decree that the said plaintiffs and such other encumbrancer or encumbrancers (if any) to release and discharge their said liens, or convey and assign the said lands, as the case may be, to said defendant (*the owner*) or to whom he may appoint.

3. And in the event of said defendant (*the owner*) paying off said plaintiff and such other encumbrancers (if any) this Court doth order and decree that said defendant (*the owner*) do pay to said defendant (*the mortgagee*) his costs of this suit forthwith after taxation thereof.

4. But in default of the said defendant (*owner*) making such payments by the time and in the manner aforesaid, this Court doth order and decree that the said lands and premises, and the other land comprised in the mortgage of defendant (*mortgagee*), be sold in one or two parcels (in the discretion of said Master) either by public auction, tender, or private contract, with the approbation of said Master, and if the said Master find it better to sell both parcels of said lands, then the one upon which the said buildings are erected is to be first sold, and the purchaser is to pay his purchase money into Court to the credit of this cause, and the said Master is to settle the conveyance to the purchaser (in case the parties differ about the same); and in the event of both parcels of said land being sold, and the proceeds being sufficient to satisfy the amount found due, said defendant (*the mortgagee*) upon his mortgage and his costs of suit to be ascertained and taxed by said Master, and also of the amounts found due said plaintiffs and all lienholders of the same class, and their costs, then the said proceeds are to be so applied and paid out of Court accordingly.

5. But in the event of the said proceeds not being sufficient to satisfy the claims referred to in the last preceding paragraph, then

this Court doth further order and decree that the said Master do enquire and find by what amount the selling value of that parcel of the said lands and premises upon which the said buildings have been erected, has been actually increased by the said buildings being erected thereupon beyond the selling value without such buildings, and the said Master is to deduct the amount of such increase from the amount realized by such sale.

6. And this Court doth declare the said defendant (*the mortgagee*) is entitled to the difference between the amount of said increase in the selling value and the amount realized by said sale, together with his said costs, and subsequent costs to be taxed by said Master, and also the amount realized by the sale of the other parcel of said lands and to have the same paid out of Court to him, and that the said plaintiffs and the other lien-holders of the same class are entitled to the residue (not exceeding the amounts found due to them by said Master) and their said costs and subsequent costs, and doth order and decree the same accordingly.

7. And this Court doth further order and decree that the residue referred to in the last preceding paragraph be applied first in payment to said plaintiffs of their costs of this suit; second, in payment to said plaintiffs and such other encumbrancer or encumbrancers (if any) of the amounts said Master shall find due to them respectively for principal money, interest, and costs, (other than the costs of the plaintiffs as aforesaid).

8. And this Court doth further order and decree that the residue (if any) after payment of the amounts referred to in the two last preceding paragraphs, be paid out to the said defendant (*the owner*) unless the defendant (*the mortgagee*) shall not have been paid in full, in which event the balance of his claim is first to be paid.

9. And this Court doth further order and decree that the said defendant (*the mortgagee*) may, if he so elect, pay to the said plaintiffs and the other lien-holders (in the proportion in which they are entitled) the difference between the selling value of said lands and premises, with the buildings erected thereon, and the selling value of said lands, without said buildings, and in case said defendant (*the mortgagee*) so elect, the said Master is to ascertain without sale by what amount the

selling value of said lands has been increased by reason of the erection of said buildings, and he is to pay the plaintiffs' costs of suit, and the amounts found due said plaintiffs and other lien-holders of same class their claims and costs *pari passu*, (after deducting the plaintiffs' costs) within one month from the date of their being ascertained.

10. And this Court doth further order and decree that in the event of said defendant (*the mortgagee*) so electing, that he be at liberty to add the sum so paid by him as aforesaid to the amount of his mortgage debt, and to proceed to recover the same in this suit by foreclosure or sale.

11. And this Court doth further order and decree that in the event of said defendant (*the mortgagee*) so electing as aforesaid, and failing to pay the said sums as aforesaid, that said premises in question be sold as hereinbefore directed, and the proceeds applied as already provided, except that said defendant (*the mortgagee*) is not to be entitled to any costs beyond what would have been incurred if he had not so elected.

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